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HORNBOOK CASE SERIES

ILLUSTRATIVE CASES

ON THE LAW OF

REAL PROPERTY

BY *ILLUM* *IVESEY* ~~W.~~ M. L. BURDICK, PH. D., LL. B.

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A COMPANION BOOK
TO
BURDICK ON REAL PROPERTY

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HORNBOOK CASES

ON THE

LAW OF REAL PROPERTY

PART I

THE NATURE OF REAL PROPERTY AND TENURE THEREOF

INTRODUCTION

I. Things Movable and Immovable¹

STRONG v. WHITE et al.

(Supreme Court of Errors of Connecticut, 1848. 19 Conn. 238.)

David White by his last will and testament gave to his son James certain lands. The will further provided as follows: "I also give to my said son all my moveable property that I shall die possessed of," etc. There was due to the testator at the time of his death a certain debt by virtue of a judgment against one Stewart obtained in the state of Ohio. The defendants claimed that according to the true intention of the testator, and the true meaning and construction of his last will and testament, the judgment against Stewart was part of the moveable property which was bequeathed to James White. The plaintiff claimed that it was not moveable property, and that it, therefore, belonged to the residuary legatee.²

STORRS, J.³ The principal question in this case is whether the bequest to the defendant, James W. White, of the testator's "moveable property," embraced the judgment against Stewart.

¹ For discussion of principles, see Burdick, *Real Prop.* §§ 3-5.

² The statement of facts is rewritten.

³ Part of the opinion is omitted.

The law attaches no technical or artificial meaning to that phrase; and we must therefore construe it according to its ordinary signification, unless there is something in the other parts of the will, which shows, that the testator intended to use it in a different sense. But we find nothing elsewhere in that instrument, which sheds any light on the subject in this respect. The popular meaning must therefore prevail. The adjective "moveable," applied to property, signifies in its ordinary and proper sense, that which is capable of being moved, or put out of one place into another. It therefore necessarily implies, that such property has an actual locality, and is susceptible of locomotion, or a change of place. But this is predicable of that only which is corporeal and tangible. A judgment is obviously not of this character; since, like other choses in action it is, in its nature, incorporeal, and therefore has no real locality; although, as we shall hereafter have occasion to perceive, judgments sometimes have, in contemplation of law, for certain purposes, (not applicable to the point now before us,) a fictitious or imaginary locality assigned to them and are deemed to exist in a particular place.

It is however insisted, that the word "moveable," applied as an epithet to property, is equivalent to the word "personal"; and in support of this claim, we are referred to Blackstone. This position however, so far from being supported, is discountenanced by that writer. In his chapter describing the nature and kinds of personal property, (2 Comm. 383,) he commences, by stating, that "under the name of things personal, are included all sorts of things moveable, which may attend to a man's person wherever he goes;" and he subsequently adds: "But things personal, by our law, do not only include things moveable, but also something more; the whole of which is comprehended under the name of 'chattels.'" He then proceeds to show, that this last term signifies not only goods or moveables, but *whatever was not a feud*, and adds: "It is in this latter, more extended, negative sense, that our law adopts it; the idea of goods or moveables only, being not sufficiently comprehensive to take in every thing that the law considers as a chattel interest." From this passage it is quite plain, that he did not deem the phrases "moveable property" and "personal property" to be equivalent; but, on the contrary, that he considered moveable property to be only one of the several species of personal property.

Judge Blackstone, speaking of what is included in personal property, mentions "moveables which may attend a man's person," etc., it is, we think, moreover, plain from the context and his subsequent enumeration, (on page 387,) of what he intended to embrace by that expression, that he used it in its literal, primitive sense, as indicating that particular species of personal property, which consists of tangible, corporeal, locomotive chattels, and not choses in action, to which it would apply only in an imaginary, artificial, legal sense; a chose in action

having, as it is sometimes expressed, no corpus, but being a mere right, not *in* a thing (in re,) but *to* a thing (ad rem,) and having, therefore, no actual locality; which right is indeed often evidenced by a written instrument, although such instrument does not constitute right itself, nor in any sense, the property therein. Indeed, those instruments, such as bonds, bills and notes, were not, at common law, the subjects of larceny, because they were not deemed to be of any intrinsic value. *Calye's Case*, 8 Co. 33; 1 Hawk. P. C. c. 33, § 55; 4 Bla. Com. 234. Nor do we find any case, in which they give a locality to the debts evidenced by them, so that those debts pass by a general bequest of property described as being situated in the place where those instruments happen to be. On the contrary, it is held, that a bill of exchange, mortgage, bond, or banker's receipt, do not pass, by a bequest of all the testator's property in a particular house, where those instruments are; and the reason given is, that bills, bonds, etc., are mere evidence of title to things out of the house and not things in it. *Fleming v. Brooke*, 1. Scho. & Lef. 318; *Lambert v. Lambert*, 11 Ves. 607. So a bequest of in-door moveables has been held not to include notes and other choses in action. *Penniman v. French*, 17 Pick. (Mass.) 404, 28 Am. Dec. 309. We cannot suppose, that Judge Blackstone intended to convey a different idea from that which we have imputed to him by those general and casual expressions to which we have been referred, in other portions of his commentaries, which, although not perhaps critically exact, were sufficiently so, for the purpose for which he introduced them in that elementary work, but were not designed to have any reference or application to such a point as the one now before us. See 1 Stephen's Com. 156; 2 Id. 65, part 2, ch. 1; Co. Litt. 118, b. 1; Atk. 183; Com. Dig. tit. Biens, D, 2.

The same remark also applies to the quotations, which have been made, by the defendants, from other elementary writers.

We have looked in vain at the cases on the subject of devises, to find any judicial construction of the particular phrase "moveable property," used in the bequest here in question, either as connected or not with the other language of the will, in reference to the question whether choses in action are thereby embraced. In *Sparke v. Denne*, however, (Wm. Jones' Rep. 225,) is a determination upon the meaning of a bequest, the language of which is exactly synonymous with that phrase, and where, as in the present case, the construction of it was not aided by any other part of the will. The testator, in that case, after devising several pecuniary legacies to several persons, devised the residue "of all my moveable goods and chattels" to his wife. The question was, whether debts due on bond to the testator, at the time of his decease, passed by that bequest; and it was held, after much argument and consideration, that they did not. The court say, that "by the devise of 'all my moveable goods and chattels,' debts, which are jura, (rights or choses in action,) are not devised." The words

"moveable property," used in the devise before us, and the words "moveable goods and chattels," used in the devise in that case, are precisely equivalent, both phrases having relation to personal property. If, therefore, the bequest is restricted, by the word "moveable," in one case, it must be in the other. It is well settled, that a bequest of "all my goods and chattels," is sufficiently comprehensive to embrace every species of personal property, and consequently, choses in action; but it was there held to be restricted, by the term "moveable," so as to exclude debts; that word having been construed, according to its ordinary and proper meaning, as applying only to tangible personal property. This case, therefore, is in point; and we find no other that is inconsistent with it. If the bequest, in the present case, had been of all the testator's moveables, his intention to exclude debts due to him, would have been more palpable; but it is difficult to distinguish that term, in meaning, from the phrase "moveable property."

There are other cases, besides the one cited, which have some, although not such a particular bearing on the question before us, as renders it important for us to notice them.

We think, therefore, that the judgment against Stewart did not pass by the devise in question.* * *

* That the term "movable" does not embrace choses in action, see *Jackson v. Vandersprengle's Ex'rs*, 2 Dall. (Pa.) 142, 1 L. Ed. 323 (1792). That it does not include a debt, see *Wood v. George*, 36 Ky. (6 Dana) 343, 344 (1838). In the civil law, movables are classed as movables by nature or movables by law. The former includes things which can move from one place to another, whether they move themselves as animals, or whether they cannot move without the assistance of extraneous power, such as inanimate things. French Civil Code, § 528. The same provision is found in the Civil Code of Louisiana of 1900 (article 473). Bonds and shares or interests in financial, commercial, or manufacturing companies are movables by operation of law. French Civil Code, § 529. When the word "movable" is used alone, however, without any other addition, it does not include money in cash, precious stones, book debts, books, instruments of trade, or provisions. French Civil Code, § 533.

WHAT IS REAL PROPERTY

I. Land Includes What¹

CANFIELD v. FORD.

(Supreme Court of New York, 1858. 28 Barb. 336.)

This was an appeal from a judgment entered upon the trial of the action at the St. Lawrence circuit, before a justice of this court, without a jury, in June, 1857. The action was for partition of real estate. Jonathan Fuller was originally the owner in fee simple, and the common source of title to the lands and premises in question. On the 6th November, 1847, Fuller and wife conveyed to Chillion Ford, the defendant, the interest in the lands in question, in three parcels described in the deed. The terms of the deed, with the covenants therein, sufficiently appear in the opinion.

Chillion Ford, on the 8th February, 1856, by like deed as to form and covenants, conveyed to John Canfield one undivided half of his interest in the said three parcels of land. On the 19th January, 1857, John Canfield and wife by a like deed as to form and covenants, conveyed two undivided third parts of his one-half interest in said estate to the plaintiff Richard B. Chapman. Canfield and Chapman then bring an action for partition against Ford, the owner of the other half. The respective interests of the parties are correctly set forth in the complaint. The other facts in the case are fully stated in the opinion of the court.

POTTER, J. The only real question to be decided in this case is, whether the parties to this action have such an estate or interest in the lands in question, as is susceptible of partition by action?

It is conceded that Jonathan Fuller was the original source of title, and that he owned the entire estate in fee simple, in quantity and quality, and that the conveyance from him to the defendant, and from the defendant Ford to Canfield, and from Canfield to Chapman, in form and covenants, are alike. It is therefore sufficient to set forth one of these conveyances. On the 6th November, 1847, Fuller and his wife conveyed by deed to Chillion Ford the defendant "and to his heirs and assigns forever, *all* the mines, ores, minerals and metals, lying or being in, or upon the lands of the parties of the first part, situate, lying and being in the town of Depeyster, in the county of St. Lawrence, [describing three parcels of land,] together with the right to raise, work, and carry away said mines, ores, minerals and metals.

¹ For discussion of principles, see Burdick, Real Prop. § 8.

And the right to put up all buildings, and to use all lands that may be necessary for the purposes aforesaid. And the right of ingress and egress thereto, and therefrom, for the purpose of raising, digging and working and carrying away said mines, ores, minerals and metals as aforesaid. And all the estate, right, title, interest, claim and demand whatsoever of the parties of the first part of, in and to the above granted mines, ores, minerals and metals. To have and to hold the above mentioned and described mines, ores, minerals and metals, to the said party of the second part, his heirs and assigns forever;" with a covenant to warrant and defend the same, in the usual form of a deed of warranty.

The revised statutes provide, that when several persons shall hold and be in possession of any lands, tenements or hereditaments, as joint tenants, or as tenants in common, in which one or more of them shall have estates of inheritance, or for life or lives, or for years, any one or more of such persons being of full age, may apply to the court for a division or partition of such premises, according to the rights of the respective parties interested therein, and for sale of such premises, if it shall appear that a partition cannot be made without great prejudice to the owners. Is the interest in question such an interest as comes within the meaning and intent of this statute? Either of the terms employed in this statute would seem to include the estate of the parties in this action. "Land," in its most general sense, comprehends any ground, soil or earth, whatsoever, as meadow, pastures, woods, moors, waters, marshes, furzes and heaths. Co. Litt. 4 a. It includes all things of a permanent and substantial nature; not only the face of the earth but everything under it or over it. 2 Bl. Com. 18. "*Cujus est solum ejus est usque ad cœlum, et ad inferos.*" "Tenements" is a word of greater meaning and extent, sometimes, than land, and includes not only land, but rents, commons, and several other rights and interests issuing out of or concerning land. 1 Steph. Com. 158, 9. "Hereditaments" is a still more comprehensive term in law, and includes whatever may be inherited, corporeal or incorporeal. 2 Bl. Com. 17. These terms, therefore, seem to be comprehensive enough to include the estate in question. I think there can be no doubt that the estate in question is an estate of inheritance. It is so by the very terms and forms of the grant. The difficulty suggested upon the argument was, how to describe this estate, so carved out of the whole fee. If it is an estate that can be partitioned, the precise description is not very material, nor is the question as to what would be the rights of the parties, after partition, at all necessary to be discussed here. The latter question does not arise in this review.

The counsel for the defendant has argued, with great force, that the right or interest which was conveyed as above stated is not a fee simple. In this, I think, he is mistaken upon authority. 1 Rev. St. (1st Ed.) p. 722, pt. 2, c. 1, tit. 2, § 2. It is not, however, necessary

that it should be a fee simple, to entitle to partition. Whatever estate it may be, the owner has such an interest in it that he can maintain trespass *quare clausum fregit* for any wrong done to it. *Worcester v. Green*, 2 Pick. (Mass.) 429. True, Lord Coke, says, "an inheritance in fee simple expresses the largest estate that a man can have in land." But Littleton says, "This doth extend as well to all fee simples conditional and qualified, as to fee simples pure and absolute, for our author speaketh here of the ampleness and greatness of the estate, and not of the perdurableness of the same, and he that hath a fee simple qualified hath as ample and great an estate, as he that hath a fee simple absolute. So as the diversity appeareth between the quantity and the quality of the estate." Littleton, 18 a. And so also Plowden says, "that two fees simple absolute, cannot be at the same time of one and the selfsame land." Plowd. 349. That is, the mines, ores and minerals being land, a man may have a fee simple in them as well as he who holds the soil that remains unconveyed may have a fee simple, for they are not the selfsame land. A man may have a fee simple not only in lands, but also in advowsons, common, estovers, and other incorporeal hereditaments. So if a man grants to another all woods, underwoods, timber trees, or others, saving the soil the grantee has a fee to take in "*alieno solo*." *Crabbe on Real Property*. § 964. The estate so partitioned, therefore is an estate of inheritance, a fee simple. It is limited in quantity, not in quality. It is carved out of a fee simple absolute, and the latter having lost this quantity of estate, is itself qualified to that extent, without losing its quality of a fee simple. The estate in controversy, I think, may also be classified among estates, as a "corporeal hereditament"; and comes within the definition of that estate, to wit, "Such hereditaments as are of a material and tangible nature, such as may be perceived by the senses, consisting wholly of substantial and permanent objects, and may be comprehended under the general denominations of lands only." *Steph. Com.* 159; *Bouv. Dict.* 288.

The class of cases referred to by the learned counsel for the defendant, which may not be partitioned, are cases of mere license, or authority to enter upon another's land, and to do a particular act, or series of acts, without possessing any estate in the land. Such interests, it is true, cannot be partitioned. This class of cases is nearly allied to, and very often confounded with, a still superior interest in real property, called an "easement," which is described as "a liberty, privilege or advantage in land, existing distinct from an ownership in the soil, and is founded on a grant by deed, or writing, or upon prescription, which supposes one, being a permanent interest in another's land, without profit, with a right at all times to enter and enjoy it." 3 *Kent's Com.* 452. Such an interest, possibly, may not be partitioned. The distinction between the two classes of cases last above mentioned, and that of a permanent grant for a good consid-

eration, of an interest in lands to be used for profit, to a man, and to his heirs and assigns forever, is palpable. There is still another distinction found in the old law books, existing in regard to estates of inheritance. Entire estates of inheritance not divisible, and estates that are divisible, and yet shall not be parted or divided between coparceners. Among the examples given of them, is found the following. If a man have reasonable estovers, as housebote, haybote, &c. appendant to his freehold, they are so entire, as they shall not be divided between coparceners." Co. 164 b. "So too of a piscarie incertaine, or a commons sauns nombre, or of a corody incertaine." Id. Another instance cited by Littleton, of estates that shall not be partitioned, is this: Lord Mountjoy, being seised of the manor of C. did by deed indented and enrolled, bargain and sell the same to one Browne in fee, in which indenture was contained a clause on the part of Browne, amounting to a grant by him of an interest and inheritance to Lord Mountjoy, his heirs and assigns, to dig for ore in the lands, (which were a great waste,) parcel of the said manor, and to dig for turf, also for the making of alum. In this case three points were resolved upon by all the judges, viz.: First. That this conveyance did amount to a grant of an interest and inheritance to Lord Mountjoy, to dig, etc. Second. That notwithstanding this grant, Browne and his heirs and assigns might dig also, and like to a case of common "sauns nombre." Thirdly. That the Lord Mountjoy might assign his whole interest to one, two or more, but then if there be two or more, they could make no division of it, but work together with one stock. Co. Lit. 164 b.

It will be seen that the reason given by the judges, why partition could not be made in the case above cited, does not at all apply to the case in question. First, the exclusive right or all the right to mines, ores, etc., was not granted in that case, but a mere right or permission to dig, etc., the grantor and his assigns might also dig; and second, the extent of the grant being uncertain, the grantee might surcharge, to the injury of the tenant of the land. Interests uncertain in their extent, could never be partitioned. In the case now in question, the tenant would be bound to take the estate, subject to the terms of the conveyance, granting the exclusive right to all the mines &c., and of the right to put up all buildings, and use all lands that may be necessary for the purposes expressed, and the right of ingress and egress thereto and therefrom. The terms of the grant, by construction, being taken most strongly against the grantor, and the whole interest in the mines, etc., being conveyed, it is immaterial to the grantor whether one person with fifty or more laborers, or fifty or more persons singly, should dig thereon, provided they use no more of the land than is necessary for the purpose of digging, &c. all the mines, ores, &c. This is a certain grant, and no difficulty occurs in making equality of division.

But if the provisions of our revised statutes are not broad enough to include the power to partition, it has been settled that this court, as now constituted, has common law jurisdiction to partition real estate; (Story's Eq. Jur. §§ 646, 658; *Smith v. Smith*, 10 Paige, 470;) limited however to the power to divide estates certain. It is only necessary in a court of equity, to entitle to partition, so far as this point is in question, to show that equality can be obtained, in value, of lands; especially in advantages and profits redounding from each share to the several owners. Allnat on Part. 10. Whatever is capable of being divided may be the subject of partition in equity. *Id.* 84.

The only remaining question raised in the case is, whether the owner of the fee qualified in quantity, out of which the estate was carved, ought not to be made a party to the action. The statute (2 Rev. St. [1st Ed.] p. 318, pt. 3, c. 5, tit. 3, § 5,) requires that the petition (complaint) shall set forth the rights and titles of all persons interested therein, etc. What interest can Fuller, the grantor of this estate, have in the estate, which by deed he has conveyed away? In the estate sought to be partitioned he has no interest whatever. The partition in no respect affects the title of Fuller. He is not a tenant in common with the parties to the suit. They own separate portions of the estate, in severalty.

I think the judgment must be affirmed.

Judgment affirmed.²

[Franklin General Term, September 14, 1858, C. L. ALLEN, JAMES, ROSEKRANS, and POTTER, Justices.]

² In *Bedlow v. Stillwell*, 91 Hun, 384, 36 N. Y. Supp. 129 (1895), it is said: "The term 'lands, tenements, and hereditaments' is generally construed to include all lands and interests in lands, corporeal or incorporeal, which would descend to an heir at law." It is also held in *Hutchinson v. Bramhall*, 42 N. J. Eq. 372, 7 Atl. 873 (1886), that the expression "lands, tenements, and hereditaments," as found in the statute concerning conveyances, providing that every deed or conveyance of or for any "lands, tenements, or hereditaments" to any purchaser of the same shall be recorded, does not include leases for years, but applies only to freehold estates.

TENEMENT.—The word "tenement" in its legal sense means an estate in land, or some estate or interest connected with, pertaining to, or growing out of the realty, of which the owner might be dispossessed. A tenement comprises everything which may be holden so as to create a tenancy in the feudal sense of the word. *Field v. Higgins*, 35 Me. 339, 341, 342 (1853), citing 3 Kent. Comm. 401. And see *Sacket v. Wheaton*, 34 Mass. (17 Pick.) 103, 105 (1835).

HIGGINS OIL & FUEL CO. v. SNOW.

(Circuit Court of Appeals of the United States, Fifth Circuit, 1902. 113 Fed. 433, 51 C. C. A. 267.)

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

The opinion of the circuit court, filed December 6, 1901, is in part as follows:

BRYANT, District Judge.* This is an application for the appointment of a receiver. The complainant, Annie E. Snow, a citizen of the state of California, joined pro forma by her husband, G. H. Snow, has filed a bill in equity against the defendants, Higgins Oil & Fuel Company and over 200 others, corporations and natural persons, citizens of the state of Texas, or of states other than California, alleging that she is the owner of a life estate in one-eighteenth, undivided, of the John A. Veatch survey of land in Jefferson county, Tex., less certain subdivisions that are excepted, embracing the greater portion of the Beaumont oil field, and including at the date of the filing of the bill 66 flowing wells, all in the possession of the defendants, who are engaged in marketing the oil. She seeks an accounting in regard to the oil taken and marketed, claiming an eighteenth thereof, and to recover the amount ascertained to be due. The bill also contains the prayer for the appointment of a receiver to take charge of the wells, so that they may be operated pending the litigation without risk or detriment to any party, or, in the alternative, that a receiver be appointed to collect one-eighteenth of the revenues from said wells, and to hold or invest the same pending the litigation, with such powers and duties as the exigencies of the case may warrant. Those of the defendants who have appeared in response to the rule to show cause why a receiver should not be appointed have filed demurrers and answers, and make substantially the following contentions: * * * (4) That as a life tenant the complainant is entitled to no interest in the oil produced, her estate being limited to the surface; and (5) that in no event should a receiver be appointed. The complainant filed a general replication.
* * *

A difficult question arises in regard to the rights of a life tenant, as respects petroleum oil obtained from the land. There seems to be no decision in Texas on the point, and but very few by the federal court; in fact, none directly in point. The statute under which the complainant acquired her life estate appears under the head, "Descent and Distribution," and reads as follows: "When any person having title to any estate of inheritance, real, personal or mixed, shall die intestate as to such estate, and shall leave a surviving husband or

* Part of the opinion is omitted.

wife, the estate of such intestate shall descend and pass as follows: (1) If the deceased have a child or children or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants." Rev. St. Tex. 1895, art. 1689.

It is noticeable that all property is classified, and its mode of descent regulated under two heads: First, "personal property," and, second, "land." The latter term is therefore employed in its most comprehensive sense, and is nomen generalissimum. A life estate is given the survivor in one-third of the land of a deceased husband or wife, in this sense necessarily, because all property of inheritance that is not land is classified as personal property, and if the mineral rights that belonged to Andrew A. Veatch by virtue of his fee simple ownership of one-sixth of this land did not pass, one-third to his widow for life, as land, it passed as personal property, one-third to her absolutely. The life estate is given, not in the surface of the land, but in the land as land, and it is elementary that the land itself in legal contemplation extends from the sky to the depths.

Coke says: "The term 'land' includes, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and it has an indefinite extent upwards as well as downwards, so as to include everything terrestrial under or over it." Co. Litt. 4a.

Blackstone says: "Land comprehends all things of a permanent and substantial nature, being a word of very extensive signification; also, if a man grants all his lands, he grants all his mines of metals and his fossils, his woods, his waters, and his houses, as well as his fields and meadows." 2 Bl. Comm. 16-18.

Washburn says: "Land is always regarded as real property, and ordinarily whatever is erected or growing upon it, as well as whatever is contained within it or beneath its surface, such as minerals and the like, upon the principle that '*cujus est solum, ejus est usque ad cælum*' in one direction, and '*usque ad orcum*' in the other." 1 Washb. Real Prop. 3.

The American and English Encyclopedia of Law (old edition) defines it as follows: "Land is the surface of the earth, whatever is attached to it by nature or by the hand of man, and all that is contained within or below it." Vol. 19, p. 1032.

In *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 665, 31 L. R. A. 130, 56 Am. St. Rep. 887, the court discussed this question of whether a life estate in land is a mere interest in the surface, and said: "It must be conceded that the life tenant is vested with the ownership

thereof as land, as being seised of the immediate freehold of possession, which possession extends from top to bottom, to the sub-surface as much as the surface, in other words, to the land as a whole, or the tenant for life has a freehold as well as a tenant in fee, and that the owners of the inheritance have no more right to approach by a tunnel, and break and enter his superficial close, than they have to break and enter his close on the surface."

Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263, is to the same effect, and in that case the court said: "Land comprehends all things of a substantial nature, which includes all ground, soil, or earth whatever, and hath in its legal signification an indefinite extent upwards as well as downwards. Minerals are a part of the land itself, and, if not susceptible of division, the wife is entitled to be endowed of the profits and rents."

According to all the cases and text-books a life estate in land invariably extends to all minerals beneath the surface; but, the right being merely to use and enjoy, and not to dispose of, the land, the difficulty arises in determining what is proper use and enjoyment, and when a life tenant may and when he may not sever and dispose of minerals without being guilty of waste. It is obvious that a life tenant, if allowed to mine, might get a much larger proportion of the benefit of the estate than he would ordinarily receive. On the other hand, if not allowed to mine, he might get much less. The courts have undertaken to draw the line, and it may be stated as a general rule, at common law, that, while a life tenant may continue to work mines that were open when the tenancy commenced, and this even to exhaustion, and may construct new approaches, he cannot open new mines, for to do so would be to commit waste. The rule allowing life tenants to mine, when the operations are commenced before the tenancy is created, is based on the theory that in such cases mining is a mere mode of use and enjoyment, and to extract minerals is but to take the accruing profits of the land. *Raynolds v. Hanna* (C. C.) 55 Fed. 801; *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, 31 L. R. A. 130, 56 Am. St. Rep. 884; *Seager v. McCabe*, 92 Mich. 186, 52 N. W. 299, 16 L. R. A. 247; *Wentz's Appeal*, 106 Pa. 301. The matter resolves itself, then, into a question of when and under what circumstances mining may be adopted as a mode of using the land. The authorities all agree that there is no restriction when the land has once been used for mining purposes before the life tenant comes in; and they now go a step further, and hold that mining will be allowed if the owner of the preceding estate has fixed on it the character of mining land by lease or the like, though no mines were opened. *Priddy v. Griffith*, 150 Ill. 560, 37 N. E. 999, 41 Am. St. Rep. 397; *Koen v. Bartlett*, *supra*; *Seager v. McCabe*, *supra*.

In the case at bar, the remainder-men, being also the owners of seventeen-eighteenths absolutely, have taken possession of the entire

property to the exclusion of the life tenant, and have converted it into an oil field. The latter has committed no waste, and the point to be decided is, not whether she might drill for oil herself, but whether she may elect to acquiesce in the changing in the mode of use. The estates were joint when the change was made, and no partition was demanded. Consequently, any advantage that ensues must inure to the benefit of all the co-tenants in proportion to their interests. *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263, is an applicable authority, in principle at least. The case involved two questions: (1) Whether a widow is entitled to dower in mines not open when her right of dower attached, but opened by the reversioner before assignment; and (2) whether a certain verbal agreement was valid as an assignment of dower. Both were decided in the affirmative.

After announcing that the first question presented was one of first impression, the court proceeds with a review of the authorities. Speaking of the rule that a life tenant or dowress may not open new mines, the court observes: "In many of the later cases, as well as the earlier cases, no reason whatever is assigned for the adoption of the rule; but, where any is assigned it is, the dowress cannot open new mines when discovered, because she would be committing waste, which she is not permitted to do. On principle, why may she not be endowed of mines opened by the heir or owner of the fee, after the dower attaches and before there has been any assignment? By all the decisions, it is not waste for her to work mines opened, although the same had been abandoned before the death of the husband. She may construct new approaches, and not be guilty of waste. The reason for the rule adopted that bars dower in all mines not opened during the lifetime of the husband failing, the rule ought not to be extended to cases not strictly within its meaning."

And finally: "The heir, by opening the mines, has destroyed all other profits of the land. There is no mode of enjoying mines, excepting by working them. If this cannot be done, they are profitless to the dowress. As we have seen, it is not waste in her to work mines opened by her husband, and, by a parity of reasoning, we reach the conclusion it is not waste for her to work mines opened by the heirs before assignment of dower."

Priddy v. Griffith, 150 Ill. 560, 37 N. E. 999, 41 Am. St. Rep. 397, was decided by the same court, and language to the same effect used. * * *

Thus far the question has been treated without distinction between conventional life estates and common-law dower on the one hand, and life estates inherited by the law of heirship and succession on the other. In *Seager v. McCabe*, *supra*, the supreme court of Michigan, construing a dower statute of that state reviewed the decisions at considerable length, made the distinction, and announced the following conclusion: "The rules applicable to a country where landed es-

tates are large and diversified, where the laws of inheritance are exclusive, where the theory of dower is subsistence merely, and where there is a strong disposition to free estates from even that charge, do not obtain in a commonwealth like ours, where estates are small, and the policy of our laws is to distribute them with each generation, where dower is one of the positive institutions of the state, founded in policy, and the provision of the widow is a part of the law of distribution, and the aim of the statute is, not subsistence only, but provision commensurate with the estate. In the present case the grant is by operation of the statute, giving the use of all the lands of which the husband was seised. The grant must be held to include the use of these lands, irrespective of whether mines are opened upon them before or after the husband's death."

The statute there construed was not as broad as the one of Texas, and was directed at the subject of dower. The Texas statute makes no mention of dower, but defines that which under the civil law would have been a usufruct,—an estate not impeachable for waste. This is specially significant, when it is remembered that the Texas system of land titles and laws of marital rights is devised largely from the civil law. *Carroll v. Carroll*, 20 Tex. 743. Under the civil law the usufructuary had a right to seek for and open every kind of mines, stone and lime quarries, chalk pits, and gravel banks. 1 Dom. Civ. Law, 843; 2 Dom. Civ. Law, 945-968; *Neel v. Neel*, 19 Pa. 323.

Another noticeable feature of the statute is that it gives the surviving husband the same estate in the land of the wife upon her death that it gives her in his land at his demise. This is a complete answer to the argument that the rule shall depend upon whether mines are open or not at the time of the husband's death, because he, by reason of his position as the head of the family, is deemed to fix for the use of his property commensurate with the necessities of his family. I think the complainant is entitled to one-eighteenth of the oil produced, after deducting all expenses of producing and marketing. If she is not entitled to the net one-eighteenth absolutely, then she is entitled to have such net yield impounded and put at interest, the interest to be paid to her during her life, while the corpus of the fund is preserved for the remainder-men. *Blakley v. Marshall*, 174 Pa. 425, 34 Atl. 564; *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292; *Bryan, Petroleum*, 41; *Macswinney, Mines*, 65. In neither event, however, should a court of equity take from the defendants the control and management of the common property. But a special receiver, more in the nature of an auditor, will be appointed for the purpose of taking and keeping accurate accounts of all oil marketed by the defendants, together with prices obtained and expenses incurred, and to collect, receive, and hold, subject to the orders of the court, one-eighteenth of the net amount of all oil so marketed. Ul-

man v. Clark (C. C.) 75 Fed. 868, Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222. * * *

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. As, by the record, the appellee, Mrs. Snow, is seised of an estate for life in one undivided one-eighteenth part of the lands described in the decree appealed from, and to that extent is a tenant in common with the owners of the fee, we all agree that she is interested in and entitled to an accounting for all oil developed and produced on and from the said lands to the prejudice of her estate, and to that end a receiver was properly appointed pending the litigation necessary to finally determine the full rights of the appellee. On this appeal no other questions need be passed upon.

The decree of the circuit court is affirmed, with costs.⁴

MT. CARMEL FRUIT CO. v. WEBSTER.

(Supreme Court of California, 1903. 140 Cal. 183, 73 Pac. 826.)

Department 1. Appeal from Superior Court, San Bernadino County.

Action by the Mt. Carmel Fruit Company against Joseph Webster and wife. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

In this case a question was raised whether, in violation of the federal statutes relating to homestead entries upon the public land, which provide that the entryman shall file an affidavit that no part of the land has been alienated by him, an entryman's deed which purported merely to convey a water right was a conveyance of "land." Only so much of the case as pertains to this question is here presented.⁵

VAN DYKE, J.⁶ * * * In this case the conveyance of the water rights in question was about four years before the homestead entry, and there is nothing to show that either of the parties to such conveyances at that time contemplated that the land should be obtained from the government by a homestead entry on the part of Webster, or that the parties were not dealing in a fair and honorable way. To the complaint in this case, the answer on the part of defendants is simply a denial of the right of the plaintiff, upon information and belief, and an allegation that the defendants did claim some right,

⁴ For further judicial definitions of land, see Mitchell v. Warner, 5 Conn. 497, 517 (1825), citing 1 Coke, Inst. 4a; Nessler v. Neher, 18 Neb. 649, 28 N. W. 471 (1886), and Lightfoot v. Grove, 52 Tenn. (5 Heisk.) 473, 477 (1871). See, also, Harder v. Plass, 57 Hun, 540, 11 N. Y. Supp. 228, 227 (1890), where it is said that the word "land" includes many things besides the earth we tread on, as, for example, water, grass, buildings, fences, trees, and the like, for all these may be conveyed by the general designation of "land."

⁵ This statement of fact is rewritten.

⁶ Part of the opinion is omitted.

title, or interest adverse to the plaintiff. There is no issue raised by the pleadings that the claim on the part of the plaintiff is founded upon any transaction entered into against public policy.

Further, the conveyances here were not, strictly speaking, for the land, or part of the same, but for an interest in appropriated water, and the right to convey the same over and across the land; and by the seventeenth section of an amendatory act of Congress of July 9, 1870, c. 235, 16 Stat. 218, it is provided "that all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this is amendatory," to wit, Act July 26, 1866, c. 262, 14 Stat. 253. U. S. Comp. St. 1901, p. 1437, § 2340.

The principle that prior appropriation of water on the public lands in California, where its artificial use for agricultural, mining, and other like purposes is absolutely essential, is lawful has all along been recognized and sanctioned by the decisions of the Supreme Court of the United States, as well as those of this state. *Osgood v. Water & Mining Co.*, 56 Cal. 580. In *Broder v. Water Co.*, 101 U. S. 274, 25 L. Ed. 790, it is said "that rights of miners, who had taken possession of mines, and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, etc.

Our Code, following the common-law rule, makes a distinction between real property and land—one of the elements of real property. "Real or immovable property consists of: (1) Land; (2) that which is affixed to land; (3) that which is incidental or appurtenant to land; (4) that which is immovable by law." "Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance." "A thing is deemed to be affixed to land when it is attached to it by root, as in the case of trees," etc. "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit; as in the case of a way, or watercourse, or of a passage for light, air, or heat from or cross the land of another." Civ. Code, §§ 658-660, 662.

The United States homestead law, it will be seen, prohibits only an agreement to sell the land, or any part thereof, or the timber thereon. The Webster deeds in question did not purport to convey the land, or any part thereof, but only an undivided portion of the water flowing in the said stream or canyon, "being on or near section 28," and also the right of way to convey said water, by ditch or otherwise, across said lands, and they were not made in contempla-

tion of the homestead entry. Such a transaction so far from being prohibited by the acts of Congress in question, or against public policy, is favored and encouraged, not only by the legislation of Congress, but by the decisions of the courts, federal and state.

Judgment affirmed.⁷

⁷ For further statutory definitions of land, see *Union Compress Co. v. State*, 64 Ark. 136, 41 S. W. 52 (1897); *People v. Board of Assessors of Brooklyn*, 39 N. Y. 81, 87 (1868); *Missouri, K. & T. R. Co. v. Miami County*, 67 Kan. 434, 73 Pac. 103, 105 (1903). See, also, *Willson's Rev. & Ann. St. Okl.* 1903, § 887; *Civ. Code S. D.* 1903, § 187; *Rev. St. Mo.* 1899, § 9123; *Code W. Va.* 1899, p. 134, c. 13, § 17; *Hurd's Rev. St. Ill.* 1901, c. 120, § 292, subd. 12; *Bates' Ann. St. Ohio*, 1904, § 2730; *Gen. St. Minn.* 1894, § 255, subd. 8; *Rev. Laws Mass.* 1902, c. 8, § 5, subd. 8.

BURD.CAS.REAL PROP.—2

FIXTURES

I. Rules for Determining Fixtures ¹

CANNING v. OWEN.

(Supreme Court of Rhode Island, 1901. 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858.)

Action by Letitia A. Canning against Ellen I. Owen and others. Judgment was rendered for plaintiff, and defendants filed a petition for a new trial. Petition granted.

TELLINGHAST, J. One of the grounds of the defendant's petition for a new trial is that the trial court allowed testimony to be introduced by the plaintiff as to the conversion by defendants of certain electric light fixtures which had been attached to the Lake View Hotel property by plaintiff while she owned the same, and which fixtures, at the time they were so attached, were intended by the plaintiff to be and remain a part of the real estate. She did not detach, or attempt to detach, said fixtures until some time after the hotel property was sold under the mortgage thereof given by her. The question raised by the ruling complained of is whether such fixtures, so annexed to the freehold, remained personal property, so as to enable the mortgagor to maintain trover against the purchaser of the real estate at the mortgagee's sale, for refusal to give them up on demand.

There is considerable conflict in the authorities as to whether such fixtures pass by a conveyance of the land on which they are placed or with which they are connected. Under the New York decisions, gas fixtures which are screwed onto the gas pipes of a building are held not to be so attached to the building as to form part of the realty. The decisions there seem to proceed upon the ground that such fixtures as are capable of being easily detached from the building, without physical injury thereto, are mere furniture, and therefore not appurtenances to the building. See *McKeage v. Insurance Co.*, 81 N. Y. 38, 37 Am. Rep. 471, and cases cited. In *Vaughen v. Halde-man*, 33 Pa. 522, 75 Am. Dec. 622, it was held that gas fixtures attached to the gas pipes by the owner of the premises were mere personal chattels, and not "fixtures," in the proper sense of the term, and hence did not pass by a sheriff's deed of the real estate. In partial support of the opinion, the court cites *Lawrence v. Kemp*, 1 Duer (N. Y.) 363, where it was decided that gas fixtures, when placed by a tenant in a shop or store, although fastened to the building, are not fixtures, as between landlord and tenant; and also *Wall v. Hinds*,

¹ For discussion of principles, see *Burdick, Real Prop.* § 16.

4 Gray (Mass.) 256, 64 Am. Dec. 64, where it was held that a lessee could take away gas pipes put in by him into a house leased to him for a hotel, and kept in place in the rooms by metal bands, though some of them passed through wooden ornaments of the ceiling, which were cut away for their removal. From the fact that the court cited these cases, it would seem that it took the view that substantially the same rule obtains regarding fixtures between vendor and vendee of real estate as obtains between landlord and tenant, which is clearly not so. The other case cited in support of the opinion, viz. *Montague v. Dent*, 10 Rich. (S. C.) 135, 67 Am. Dec. 572, was clearly in point, as there it was held that gas fixtures, such as chandeliers and side brackets, attached to the gas pipes by the owner of the premises, were mere personal property, and not fixtures, and hence did not pass by a sheriff's sale of the real estate to which they were attached.

In Minnesota the same rule obtains as to gas fixtures, although the court, while holding that they are not part of the realty, admits that it is only by reason of an arbitrary and inconsistent exception, which has been established by the authorities, that it feels called upon to so hold. The court say that the distinction between radiators, which it holds to be part of the realty, and gas fixtures, is not clear in principle. See *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582.

In speaking of radiators, the court say: "Such radiators are an essential part of such plant, and are rarely furnished by tenants or temporary occupants of buildings as a part of the furniture brought with them or carried away with them, but the owner who furnishes the rest of such plant usually furnishes the radiators also. When, under ordinary circumstances, the owner of the building attaches such radiators to his steam plant, it should be held that he intended them to be permanently annexed to the realty. We are cited to *Bank v. North*, 160 Pa. 303, 28 Atl. 694, which holds to the contrary. This case holds that such radiators are analogous to gas fixtures, and therefore not a part of the realty. By following the same process of reasoning by analogy, you would strip a house of all modern improvements, and by continuing the process you would overturn the greater part of the law of fixtures. A correct rule should not, in this manner, be overturned by an inconsistent exception." The court did hold, however, that the electric annunciator, which was attached to the wall, and to all the wires of the electric call or electric bell system of the hotel, was a part of the realty.

Massachusetts decisions are classed, in the *American and English Encyclopedia of Law* (volume 13, New Ed., 666), with those which hold that gas fixtures are not a part of the realty as between vendor and vendee; and the plaintiff's counsel cites *Guthrie v. Jones*, 108 Mass. 191, and *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353, in support of this view. The first-named case is clearly not in point, as

it was a case between landlord and tenant. And, moreover, it appears, by the second opinion given in the case (see page 195), that the first one was materially modified. The second case, while it holds that gas fixtures are in the nature of furniture, and do not lose their character as chattels by being affixed to the house by screws and cement, is not clearly in point as an authority in the case before us, for the reason that the gas fixtures and other fixtures in question in that case were purchased and affixed to the house by the plaintiff, who was not the owner thereof, but who had taken possession under a mere verbal agreement for the purchase thereof. No deed was ever given, and the question which arose in the case was whether the gas fixtures, portable furnace, and certain other things which the plaintiff had attached to the house during the time of his occupancy thereof became part of the realty, and the court held that they did not. The fact that the court, in support of its opinion, cited *Guthrie v. Jones*, supra, would seem to indicate that it treated the case before it as one between landlord and tenant, rather than as one between a vendor and vendee of real estate.

McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 12, is more nearly in point as an authority for the plaintiff, and it may be that the language there used by the court is broad enough to include gas fixtures in the category of articles which do not become part of the realty by being affixed thereto. Like the case before us, it was one where the rights of the parties were to be determined by the rules which apply between mortgagor and mortgagee upon a foreclosure sale of the realty. The court said: "Many things which, as between landlord and tenant, would be removable as chattels, are regarded as part of the realty in favor of a mortgagee. In ascertaining what articles have become part of the realty, regard must be had to the manner in which, the purpose for which, and the effect with which, they are annexed. * * * Whatever is placed in the building by the mortgagor to carry out the obvious purpose for which it was erected, or to permanently increase its value for occupation, becomes part of the realty, though not so fastened that it cannot be removed without serious injury, either to itself or to the building. On the other hand, articles which are put in merely as furniture are removable, though more or less substantially fastened to the building. So, too, machines not essential to the enjoyment and use of a building, occupied as a manufactory, nor especially adapted to be used in it, are removable, though fastened to the building, when it is clear that the purpose of fastening them is to steady them for use, and not to make them a permanent part of, or adjunct to, the building."

But, conceding that the Massachusetts decisions are in harmony with those of the other states above referred to, yet as the contrary view is taken by other courts of last resort, and as we are not bound by any previous decision of our own court in the premises, we feel

at liberty to adopt a different rule, and one which, as it seems to us, is more logical, and more in keeping with the true idea as to what constitutes and goes to make up real estate as between the vendor and vendee thereof. We think the correct rule of law in such cases is the common-law rule, viz.: That whatever is once annexed to the freehold, which is designed by the owner thereof to be used and enjoyed in connection therewith, becomes a part of the realty, and passes with the conveyance thereof. *Graeme v. Cullen*, 23 Grat. (Va.) 290. And although this rule does not obtain as between landlord and tenant, in relation to articles attached to the freehold for ornamental or domestic use, and also with regard to "trade fixtures," so called, yet it does obtain and should be strictly enforced as between vendor and vendee. It is doubtless true that, as a general thing, a tenant may remove whatever he has added to the realty, when he can do so without injury to the freehold, "unless," as said by Field, J., in *Sands v. Pfeiffer*, 10 Cal. 264, "it has become, by its manner of addition, an integral part of the original premises." "But not so a vendor. As against him all fixtures pass to his vendee, even though erected for the purposes of trade and manufacture, or for ornament or domestic use, unless specially reserved in the conveyance." And the same strict rule which applies between heir and executor applies equally between vendor and vendee and between mortgagor and mortgagee. 2 Kent, Comm. 411-413.

We are aware that it has been held in some cases that, in order to give chattels the character of fixtures, they must be so affixed to the realty that they cannot be removed without physical injury thereto; but we think the better opinion, as well as the better reason, is the other way, and in favor of regarding everything as a fixture which has been attached to the realty, with a view to enhance the value thereof, and for the purpose of being permanently used in connection therewith. Nor is it necessary that the intention of the owner in affixing such articles should be expressed in words; for it may be, and ordinarily should be, inferred from the nature of the articles affixed, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and the purpose or use for which it is made. *Hutchins v. Masterson*, 46 Tex. 554, 26 Am. Rep. 286. Under the old law, the principal test as to what was or was not a fixture was said to be the nature of the physical attachment to the soil. But this theory has long since been exploded. And as said by Mr. Washburn in his work on Real Property (volume 1, 5th Ed., p. 22): "While courts still refer to the character of the annexation as one element in determining whether an article is a fixture, greater stress is laid upon the nature and adaptation of the article annexed, the uses and purposes to which the land is appropriated at the time the annexation is made, and the relations of the party making it to the property in question, as settling that a permanent ac-

cession to the freehold was intended to be made by the annexation of the article." See, also, *Davis v. Mugan*, 56 Mo. App. 311; *Ewell*, *fixt.* p. 43, and cases in note 2.

In other words, the question whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their own nature and their adaptation to the purposes for which they are used. See the leading English case of *Elwes v. Mawe* (8th Ed.) 2 Smith, Lead. Cas. 169, and note. In *Farrar v. Stackpole*, 6 Greenl. 157, 19 Am. Dec. 201, the court said: "Modern times have been fruitful of inventions and improvements for the more secure and comfortable use of buildings, as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun whenever it is desirable so to do, are of modern use; so are lightning rods, which have become common in this country and in Europe. These might be removed from the building without damage; yet, as suited and adapted to the building upon which they are placed and as incident thereto, they are doubtless part of the inheritance, and would pass by a deed as appertaining to the realty." In *Johnson's Ex'r v. Wiseman's Ex'r*, 4 Metc. (Ky.) 357, 83 Am. Dec. 475, the question arose whether chandeliers and gas fixtures passed by the sale of the house in question, and it was held that they did. The court said: "There can be no doubt that, upon the sale of the freehold, fixtures will pass, in the absence of any express provision to the contrary." Speaking of the fixtures in question, the court said: "Purchasers and strangers, seeing them in their appropriate places, and no objections made to the sale, would regard them as a part of the freehold, and would bid for the property with the belief that the acquisition of it would confer upon them the right to these articles which, from their nature and position, seemed to be incident to and a part thereof, and thereby be induced to bid more than they would otherwise have done." *Walmsley v. Milne*, 7 C. B. (N. S.) 115, is a strong authority for the principle that where an article is once affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as a part of the realty; at all events, where the object of setting up the articles is to enhance the value of the premises to which they are annexed for the purposes to which those premises are applied. See, also, *Holland v. Hodgson*, 7 L. R. C. P. 328; *Parsons v. Copeland*, 38 Me. 537; *Strickland v. Parker*, 54 Me. 263; *Price v. Brayton*, 19 Iowa, 311; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310; *Pea v. Pea*, 35 Ind. 387; *Fechet v. Drake*, 2 Ariz. 239, 12 Pac. 694; *Arnold v. Crowder*, 81 Ill. 56, 25 Am. Rep. 260.

Adopting the general rule, then, as we do, that, as between the vendor and vendee of real estate, whatever has been physically annexed or affixed thereto by the owner, under the conditions aforesaid, becomes part and parcel thereof, and passes with the conveyance of

the estate, it follows that the electric light fixtures in question, which take the place of and serve the same purpose as ordinary gas fixtures, passed to the defendants by the conveyance referred to, and hence that the ruling complained of was erroneous. We can see no reason whatever why such fixtures are not as much a part of the realty as radiators, water faucets, set tubs, bath tubs, and bowls, portable furnaces connected with hot-air pipes for heating the building, storm doors and storm windows, window blinds, whether inside or outside, fire grates, pumps, mantels, and such other things as are annexed to the freehold with a view to the improvement thereof. All of these things, though mere chattels before their annexation to the freehold, are no longer such after their annexation, any more than the other materials which go to make up the house, but then become part and parcel of the real estate, and the mere fact that they can be removed therefrom without physical injury to the freehold does not change their character as between the vendor and vendee of the realty.

That the authorities upon the question as to what are fixtures in cases of this sort are hopelessly at variance is apparent, upon even a casual examination thereof. Indeed, it has frequently been said that there is no other legal term in so general use as the word "fixtures" to which there have been more different and contradictory significations attached. *Ewell, Fixt. 1.* We are therefore at liberty, as before suggested, to follow that line of decisions which seems to us the most reasonable and logical, and the conclusion already stated has been reached in that way.

In relation to the statement, hereinbefore made, to the effect that we are not bound by any former decision of our own court in the premises, it is proper to say that we have not overlooked the definition of the term "fixtures" as laid down by *Greene, C. J., in Gas Co. v. Thurber, 2 R. I. 15, 55 Am. Dec. 621.* But, as that was not a case where the gas company owned the land in which the pipes in question were laid, it is not opposed to the view which we have now taken. Indeed, it rather supports our view, as the court said, that "if the gas company owned the land in which the pipes were laid, we should have no doubt they would be fixtures."

Another ground upon which the defendants ask for a new trial is that the damages awarded by the jury were excessive. We think it is clear that this ground is also well taken. The amount awarded was \$1,069.87, which is the exact footing of the schedule values of the long and promiscuous list of articles which the plaintiff attached to her declaration. As to many of these articles, there is no sufficient evidence that they ever came into the defendants' possession; as to others, it is very clear from the evidence that they were included in the personal property mortgage to Mrs. Owen, which mortgage had been foreclosed by her before the commencement of this action; and as to nearly all of the articles it is evident that the prices fixed

thereon by the plaintiff are greatly in excess of their real value. The diamond ring, for which the jury allowed the plaintiff \$300, had been pledged by the plaintiff, according to her own testimony, to Mrs. Owen as security for a loan, which loan had not been paid, and hence, of course, trover would not lie for it; and the bath tub and coal grate sued for were evidently a part of the realty, under the rule aforesaid. Moreover, as to the bath tub, although there was not a word of testimony offered concerning its value, the jury allowed the sum of \$100 therefor. The evidence also shows that the plaintiff was in possession of most of the articles sued for at the time she made the demand therefor upon the defendants, and that she could then have removed the same from the premises if she had seen fit. This being so, the demand and refusal, as to them, did not constitute trover.

In short, under the evidence submitted, we think that in no event can the plaintiff recover, except as to a very few and relatively unimportant part of the articles mentioned in said schedule. Petition for new trial granted.²

SNEDEKER v. WARRING.

(Court of Appeals of New York, 1854. 12 N. Y. 170.)

The plaintiff purchased a statue and sun-dial at a sale under execution on a judgment against James Thom, a sculptor, and brought this action to recover their value of the defendant, who refused to allow the plaintiff to remove them from the places where they were erected on the grounds in front of the sculptor's house on Staten Island, the defendant having purchased the premises at a mortgage sale thereof. The facts are stated in the opinion. Judgment was rendered on a verdict in favor of the plaintiff for \$1,675 and affirmed by the General Term. The defendant brought this appeal.

PARKER, J. The facts in this case are undisputed, and it is a question of law whether the statue and sun-dial were real or personal property. The plaintiffs claim they are personal property, having pur-

² In the earlier cases, the sole test of a fixture was whether or not it was physically annexed to the realty. See *Walker v. Sherman*, 20 Wend. (N. Y.) 636 (1839); *Tearf v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634 (1853). It is still a positive provision of the Civil Law that an owner of a movable article is supposed to have placed it upon his estate to remain there perpetually when it is fastened with plaster, or mortar, or cement. French Civil Code, § 525. In this country, gas fixtures and chandeliers are usually regarded as furniture, or "domestic fixtures," and not as fixtures proper. In support of this view, see *L'Hote v. Fulham*, 51 La. Ann. 780, 25 South. 655 (1899); *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582 (1895); *Rogers v. Crow*, 40 Mo. 91, 93 Am. Dec. 299 (1867); *McKeage v. Hanover F. Ins. Co.*, 81 N. Y. 38, 37 Am. Rep. 471 (1880). See, also, *New York L. Ins. Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229 (1901) holding that, as between a mortgagee of realty and a vendee of the fixtures, the chandeliers in a theater are not fixtures. In *Berliner v. Piqua Club Ass'n*, 32 Misc. Rep. 470, 66 N. Y. Supp. 791 (1900), it is held, however, that chandeliers in a clubhouse are included in a mortgage of the realty.

chased them as such under an execution against Thom. The defendant claims they are real property, having bought the farm on which they were erected at a foreclosure sale under a mortgage executed by Thom before the erection of the statue and sun-dial, and also as mortgagee in possession of another mortgage, executed by Thom after their erection. The claim of the defendant under the mortgage sale is not impaired by the fact that the property in controversy was put on the place after the execution of the mortgage. *Corliss v. McLagin*, 29 Me. 115; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306, 38 Am. Dec. 368. Permanent erections and other improvements, made by the mortgagor on the land mortgaged, become a part of the realty and are covered by the mortgage.

In deciding whether the property in controversy was real or personal, it is not to be considered as if it were a question arising between landlord and tenant, but it is governed by the rules applicable between grantor and grantee. The doubt thrown upon this point by the case of *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107, is entirely removed by the later authorities, which hold that, as to fixtures, the same rule prevails between mortgagor and mortgagee as between grantor and grantee. *Union Bank v. Emerson*, 15 Mass. 159; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306, 38 Am. Dec. 368; *Robinson v. Preswick*, 3 Edw. Ch. 246; 1 Hill. on Mort. 294, note f, and cases there cited. And see *Bishop v. Bishop*, 11 N. Y. 123, 126, 62 Am. Dec. 68.

Governed, then, by the rule prevailing between grantor and grantee, if the statue and dial were fixtures, actual or constructive, they passed to the defendant as part of the realty.

No case has been found in either the English or American courts deciding in what cases statuary placed in a house or in grounds shall be deemed real and in what cases personal property. This question must, therefore, be determined upon principle. All will agree that statuary exposed for sale in a workshop, or wherever it may be before it shall be permanently placed, is personal property; nor will it be controverted that where statuary is placed upon a building, or so connected with it as to be considered part of it, it will be deemed real property and pass with a deed of the land. But the doubt in this case arises from the peculiar position and character of this statue, it being placed in a court-yard before the house, on a base erected on an artificial mound raised for the purpose of supporting it. The statue was not fastened to the base by either clamps or cement, but it rested as firmly on it by its own weight, which was three or four tons, as if otherwise affixed to it. The base was of masonry, the seams being pointed with cement, though the stones were not laid in either cement or mortar; and the mound was an artificial and permanent erection, raised some two or three feet above the surrounding land, with a substantial stone foundation.

If the statue had been actually affixed to the base by cement or clamps, or in any other manner, it would be conceded to be a fixture,

and to belong to the realty. But as it was, it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercise a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands.

By the civil law, columns, figures and statues, used to spout water at fountains, were regarded as immovable or real (1 Pandects, lib. 19, tit. 1, § 17, by Pothier, 107), though it was inferred that statues resting on a base of masonry were not immovable, because they were there, not as part of the construction, but as ornaments (Corp. Juris Civ., by Kreigel, lib. 19, tit. 1, § 17; Poth. Pand. 109; Burr. Law Dict. "Affixus"). But Labeo held the rule to be "*ea quæ perpetui usus causa in ædificiis sunt, ædificii esse; quæ vero ad præsens, non esse ædificii*"; thus making the kind of property depend upon the question whether it was designed by the proprietor to be permanent or temporary, or, as it was generally called by civilians, "its destination." Corp. Jur. Civ., by Kreigel, lib. 19, tit. 1, § 17.

And Pothier says that when, in the construction of a large vestibule or hall, niches are made the statues attached ("*attachées*") to those niches make part of the house for they are placed there *ad integrandam domum*. They serve to complete that part of the house. Indeed, the niches being made only to receive the statues, there will fail to be any thing in the vestibule without the statues; and he says, it is of such statues that we must understand what Papinianus says: "*Sigilla et statuæ affixæ, instrumento domus non continentur, sed domus portio sunt.*" Pothier de Communauté, § 56.

By the French law, statues placed in a niche made expressly to receive them, though they could be removed without fracture or deterioration, are immovable, or part of the realty. Code Nap. § 525. But statues standing on pedestals in houses, court-yards and gardens retain their character of "movable" or personal. 3 Touillier, Droit Civil de France, 12. This has reference to statues only which do not stand on a substantial and permanent base or separate pedestal made expressly for them. For when a statue is placed on a pedestal or base of masonry constructed expressly for it, it is governed by the same rule as when placed in a niche made expressly to receive it, and is immovable. 2 Répertoire Générale, Journal du Palais, by Ledru Rollin, 518, § 139. The statue in such case is regarded as making part of the same thing with the permanent base upon which it rests. The reasons for the French law upon this subject are stated by the same author in the

same work, page 517, section 129, where the rule is laid down with regard to such ornaments as mirrors, pictures and statues, that the law will presume the proprietor intended them as immovable, when they cannot be taken away without fracture or deterioration, or leaving a gap or vacancy. A statue is regarded as integral with the permanent base on which it rests, and which was erected expressly for it, when the removal of the statue will offend the eye by presenting before it a distasteful gap ("vide choquant") a foundation and base no longer appropriate or useful. *Id.* § 139. Things immovable by destination are said to be those objects movable in their nature, which, without being actually held to the ground, are destined to remain there perpetually attached for use, improvement or ornament. 2 *Ledru Rollin, Répertoire Générale*, 514, § 30.

I think the French law, as applicable to statuary, is in accordance with reason and justice. It effectuates the intention of the proprietor. No evidence could be received more satisfactory of the intent of the proprietor to make a statue a part of his realty, than the fact of his having prepared a niche or erected a permanent base of masonry expressly to receive it; and to remove a statue from its place, under such circumstances, would produce as great an injury and do as much violence to the freehold, by leaving an unseemly and uncovered base, as it would have done if torn rudely from a fastening, by which it had been connected with the land. The mound and base in this case, though designed in connection with the statue as an ornament to the grounds, would, when deprived of the statue, become a most objectionable deformity.

There are circumstances in this case, not necessary under the French law, to indicate the intention to make the statue a permanent erection, but greatly strengthening the presumption of such intent. The base was made of red sandstone, the same material as the statue, giving to both the statue and base the appearance of being but a single block, and both were also of the same material as the house. The statue was thus peculiarly fitted as an ornament for the grounds in front of that particular house. It was also of colossal size and was not adapted to any other destination than a permanent ornament to the realty. The design and location of the statue were in every respect appropriate, in good taste, and in harmony with the surrounding objects and circumstances.

I lay entirely out of view in this case the fact that Thom testified that he intended to sell the statue when an opportunity should offer. His secret intention in that respect can have no legitimate bearing on the question. He clearly intended to make use of the statue to ornament his grounds, when he erected for it a permanent mound and base; and a purchaser had a right so to infer and to be governed by the manifest and unmistakable evidences of intention. It was decided by the Court of Cassation in France, in *Hornelle v. Enregistr.* (2 *Ledru Rollin, Journal du Palais, Répertoire*, etc., 214), that the destination which gives

to movable objects an immovable character results from facts and circumstances determined by the law itself, and could neither be established or taken away by the simple declarations of the proprietor, whether oral or written. There is as much reason in this rule as in that of the common law which deems every person to have intended the natural consequences of his own acts.

There is no good reason for calling the statue personal property because it was erected for ornament only, if it was clearly designed to be permanent. If Thom had erected a bower or summer-house of wicker-work, and had placed it on a permanent foundation in an appropriate place in front of his house, no one would doubt it belonged to the realty; and I think this statue as clearly belongs to the realty as a statue would, placed on the house, or as one of two statues placed on the gate-posts at the entrance to the grounds.

An ornamental monument in a cemetery is none the less real property because it is attached by its own weight alone to the foundation designed to give it perpetual support.

It is said the statues and sphinxes of colossal size, which adorn the avenue leading to the temple of Karnak at Thebes, are secured on their solid foundations only by their own weight. Yet that has been found sufficient to preserve many of them undisturbed for four thousand years (Taylor's *Africa*, 113 et seq.); and if a traveler should purchase from Mehemet Ali the land on which these interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were the still unadministered personal assets of the Ptolemies, after an annexation of such long duration. No legal distinction can be made between the sphinxes of Thebes and the statue of Thom. Both were erected for ornament, and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means.

I apprehend the question, whether the pyramids of Egypt or Cleopatra's needle are real or personal property, does not depend on the result of an inquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers, or sealing wax, or a handful of cement. It seems to me puerile to make the title to depend upon the use of such or any other adhesive substances, when the weight of the erection is a much stronger guaranty of permanence.

The sun-dial stands on a somewhat different footing. It was made for use as well as for ornament, and could not be useful except when firmly placed in the open air and in the light of the sun. Though it does not appear that the stone on which it was placed was made expressly for it, it was appropriately located on a solid and durable foundation. There is good reason to believe it was designed to be a permanent fixture, because the material of which it was made was the same as that of the house and the statue, and because it was in every respect adapted to the place.

My conclusion is, that the facts in the case called on the judge of the Circuit to decide, as a matter of law, that the property was real, and to nonsuit the plaintiff; and if I am right in this conclusion, the judgment of the Supreme Court should be reversed.

JOHNSON and DENIO, JJ., dissent.*

Judgment reversed.

II. Time of Removal ⁴

MUELLER v. CHICAGO, M. & ST. P. RY. CO..

(Supreme Court of Wisconsin, 1901. 111 Wis. 300, 87 N. W. 239.)

Appeal from circuit court, Pepin county; E. W. Helms, Judge.

Action of conversion by Anton Mueller against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

CASSODAY, C. J. This is an action to recover damages for the wrongful conversion of a lean-to upon the section house of the defendant at Savoy, near Maxville station. Issue being joined, and trial had, the court, at the close of the testimony on the part of the plaintiff, granted a nonsuit, and from the judgment entered thereon the plaintiff brings this appeal.

It appears from the record, and is undisputed, in effect, that in the spring of 1897 the defendant employed the plaintiff to work for it as section foreman on that section, with the understanding and agreement that the plaintiff and his family should occupy the section house of the defendant at that place; that such section house was 16 feet wide by 26 feet long, and 1½ stories, or 12 feet, high, and situated upon blocks, and upon the land of the defendant, and about 150 feet from the main track, and had an addition to it at the time, which the plaintiff removed after he moved into the section house; that while the plaintiff was so occupying such section house with his family, he did, with the knowledge and consent of the defendant, purchase lumber, and constructed a small lean-to, for a kitchen, against said section house at the cost and of the value of \$67, and also with such knowledge and consent put in a pump of the value of \$7; that such lean-to had two common, middle-sized windows of four lights each, and one door; that the section house had boards up and down, and the plaintiff nailed a two by four piece of lumber on the section house, and fastened the lean-to to that; that the floor was a double floor, and matched, and overhead there was a single pine flooring, matched; that the inside was ceiled up with flooring; that, after the section house and lean-to had remained in that

* The dissenting opinion is omitted.

⁴ For discussion of principles; see Burdick, Real Prop. § 17.

condition for over two years, changes were made on the outside, and, while the plaintiff and his family were still occupying the same as tenant of the defendant, the defendant's bridge carpenters papered and sided the same as directed by the plaintiff, but so that the siding did not go further than the section house, leaving a seam between it and the lean-to; "that, after the plaintiff had placed the repairs and improvements on said section house in the manner aforesaid, and while he was living in said house, the defendant covered all the same with outside sheeting or lap-siding in the usual way, and thereby converted all the same to its own use and benefit, and prevented the plaintiff from removing all the same, as he intended to do in case the defendant did not buy the same from him; and that, soon after the defendant had covered the lumber that the plaintiff had placed on its said building and put in said kitchen, it discharged him from its said employment." The plaintiff was so employed by the month for no stated time, and could quit whenever he pleased, and could be discharged at the pleasure of the defendant. He was discharged in the spring of 1900. After he and his family had moved away, the plaintiff asked the defendant's road master if he could not pay the defendant for the siding it had so placed upon the lean-to, and for the two days' work in putting it on, and then be allowed to take the lean-to away, and remove it to Durand; but the road master replied that that would destroy or injure the building. The plaintiff paid no rent for so occupying the section house with his family, and never agreed to.

Upon the facts stated, it is obvious that the lean-to became a fixture on the premises of the defendant, within the principles of law repeatedly and recently stated by this court. *Gunderson v. Swarthout*, 104 Wis. 186, 190-192, 80 N. W. 465, 76 Am. St. Rep. 860, and numerous cases there cited; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698, 700-702, 53 L. R. A. 603, 84 Am. St. Rep. 867, and cases there cited. It was physically attached to the section house, and hence to the realty. It was adapted to the use and purpose to which the realty was devoted. It was the intention of the plaintiff, in constructing the same, that it should be so attached, and that it should be used in connection with the section house. There is no claim nor pretense that the defendant ever agreed that the plaintiff might remove the lean-to from the premises. Certainly, a tenant of a dwelling house, in possession under a lease which does not provide that he may remove fixtures placed thereon by him, cannot, after he has surrendered possession to his landlord, re-enter, and remove such fixtures, without permission of his landlord. *Yates v. Bachley*, 33 Wis. 185; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554; *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700.

We find no error in the record. The judgment of the circuit court is affirmed.

PART II

RIGHTS IN REAL PROPERTY

(A) Ownership

ESTATES IN FEE SIMPLE

I. Estates in Fee Simple ¹

See *Canfield v. Ford*, ante, p. 5.

II. Creation ²

FULLER v. MISSROON.

(Supreme Court of South Carolina, 1892. 35 S. C. 314, 14 S. E. 714.)

Appeal from common pleas circuit court of Charleston county; J. J. Norton, Judge.

Under the decree for partition in the case of Susan J. Fuller against Anna C. Missroon and others, the master in chancery sold the premises to J. H. Heinsohn on a contract which Heinsohn afterwards refused to perform; and on the hearing of a rule to show cause specific performance was decreed, from which Heinsohn appeals. Affirmed.

POPE, J.³ On the 6th day of February, 1829, Thomas Hauscome, of the city of Charleston, executed his deed, whereby he conveyed unto Dr. Thomas Logan, his heirs and assigns, forever, a certain house and lot situate in Charleston county, upon the following trusts: "To suffer and permit Mrs. Ann Holmes and her husband, for and during their joint lives to occupy and enjoy said premises, or to receive the income thereof, and upon the death of either of said parties, viz., Mrs. Ann Holmes or her said husband, then in trust to suffer and permit the survivor to enjoy the income thereof during his or her life, and, upon the death of the survivor, then in trust to

¹ For discussion of principles, see *Burdick*, Real Prop. § 27.

² For discussion of principles, see *Burdick*, Real Prop. § 28.

³ Part of the opinion is omitted.

be absolutely vested in such issue of their present marriage as may be living at the death of the survivor aforesaid, to be held by them, if more than one, as tenants in common; and I, the said Thomas Hauscome, do hereby authorize and empower the said Dr. Thomas Logan, at any time hereafter, at the request of the said Mr. and Mrs. Holmes or the survivor, in writing, to that effect, to sell and dispose of the said property in such way as they may so direct, and to vest the proceeds in any other species of property, to be held, however, subject to the trusts mentioned in the deed." * * * *

In construing deeds, courts are bound to ascertain the intention of the grantor, and give effect to such intention, unless the same is repugnant to the law of the land. In this connection, we quote the very appropriate language of the late Chief Justice Simpson in delivering the opinion of this court in the case of *McCown v. King*, 23 S. C. 233: "The object of construction as to deeds—in fact, as to all papers in contest before the courts—is to reach the intention of the parties, because it is this that must control; otherwise, the contract would be the contract of the court, and not of the parties." To the same effect is the language of the present chief justice in delivering the opinion of the court in the case of *Mellichamp v. Mellichamp*, 28 S. C. 129, 5 S. E. 333. What, therefore, was the intention of Hauscome, as derived from the language employed in this deed? It is very evident that Mrs. Ann Holmes was the first person for whom he desired to provide; for the consideration expressed for the deed is "the regard I have for Mrs. Ann Holmes." The trustee selected is her father, Thomas Logan. Hauscome realized that his desire of benefiting Mrs. Holmes could only be exercised by the employment of a trustee to hold the property for her; for at that time the wife could not hold property without danger of its loss, because of the marital rights of the husband attaching thereto. Hence the grantor provides her a life-estate therein. But he does more; for he gives it into the power of Mrs. Holmes to have the property sold, and the proceeds arising from such sale invested "in any other species of property," to be held subject to the trusts enumerated in the deed. The grantor is not satisfied with his generous provision for Mrs. Ann Holmes; for he looks beyond her life, and provides that the house and lot should vest absolutely in her issue living at the death of the survivor of herself and husband. To effectuate these appropriate objects, he grants the premises in question to Dr. Logan, "his heirs and assigns, forever," upon the foregoing trusts. What estate did the grantor intend for such issue? Was it a life-estate, as appellant contends, or was it an estate in fee-simple, as is contended by the respondents?

* In connection with this case, the court below held that the deed of Thomas Hauscome to Logan, trustee, created a fee simple estate in favor of the issue of the marriage of Mrs. Ann Holmes and her husband, living at the death of the survivor. This was one of the grounds of appeal, it being contended by the appellant that the above issue took merely life-estates.

We have, as in duty bound, given this matter the best consideration that we could, under the circumstances that surround the members of this court; for we have studied their case, carefully considered their arguments, and referred to the authorities cited by them, respectively. We are constrained to hold that the issue, at the death of Mrs. Ann Holmes, in October, 1889, took a fee-simple title to these premises as tenants in common therein. We are satisfied that the principles announced and the authorities cited in the opinion of the court in the case of *Bratton v. Massey*, 15 S. C. 281, are decisive of the matter of the construction of this deed. Briefly, what was there decided: Gilman had made a deed of certain property to B. H. Massey, his heirs and assigns, forever, in trust for the wife of Gilman, to be used and enjoyed by her as if she were sole and unmarried, with power in her to have her trustee sell any or all of the property, real or personal, such trustee to make titles to such property so sold, and with full power to devise or bequeath the same by will. Mrs. Gilman died after her husband, not having made a will. Gilman having died insolvent, his creditors sought to make the property held by the trustee liable to Gilman's debts, on the ground that, by the terms of the deed, no provision was made of aught but a life-estate to Mrs. Gilman, and therefore that her heirs could not inherit the same. But the court held that the intention of Gilman was that his wife should have the fee-simple to such property. The court admitted in that case that the trusts were not created to Mrs. Gilman and her heirs by words to that effect, and that it was true that in the conveyance of a legal estate the word "heirs" is necessary to create a fee-simple, and also, as a general proposition, that courts of equity, in construing limitations of trusts, adopt the rules of law applicable to the legal estate, (*Washb. Real Prop. bk. 2, c. 3. § 2*.) yet, as the same writer, Mr. Washburne, says, at page 40 of the same section, there are some exceptions to such rule, one of which he states as follows: "Another exception is that the word 'heirs' is not always necessary in order to give an equitable estate the character of inheritability, if it requires that such an effect should be given to carry out the clear intention of the party creating it. Thus it is said, if land be given to a man without the word 'heirs,' and a trustee be declared of that estate, and it can be satisfied in no other way but by the cestui que trust taking an inheritance, it has been construed that a fee passes to him, even without the use of the word 'heirs.'" Citing the cases of *Villiers v. Villiers*, 2 Atk. 71, and *Fisher v. Fields*, 10 Johns. (N. Y.) 505, in both of which cases deeds, not wills, were being construed. This decision quoted the words of Kent, C. J., in *Fisher v. Fields*, supra: "There never was a greater mistake, as I apprehend, than the supposition that this transfer of the soldier's rights to Birch is to be tested by the strict technical rules of a conveyance of land at common law, and that Birch did not

take the whole interest of the soldier, because the word 'heirs' was not inserted in the assignment." Again: "A trustee or cestui que trust will take a fee without the word 'heirs' where a less estate will not be sufficient to satisfy the purposes of the trust." Again: "A trust is merely what a use was before the statute of uses, and the same rules apply to trusts in chancery now which were formerly applied to uses; and in exercising its jurisdiction over executory trusts the court of chancery is not bound by the technical rules of law, but takes a wider range, in favor of the intent of the party."

In the case of *Bratton v. Massey*, supra, the court seized upon the almost unlimited power of disposition given to Mrs. Gilman to deduce the intention of the grantor that the estate created by his deed was a fee-simple, by, in effect, supplying the word "heirs." In the case at bar the intention of the grantor, after the termination of the life-estate therein created, to vest the fee in "issue" living at death of survivor, is also made manifest by the terms of the instrument; the same power of sale over the entire premises. In *Bratton v. Massey*, no words of inheritance were used. In the case at bar the words "to vest in issue absolutely" are found. It is true in the case of *Mendenhall v. Mower*, 16 S. C. 303, this court said: "But the word used in this case is the word 'issued.' This, as to real property, is not the apt word of inheritance, and does not *in itself* [italics ours] carry a fee in a deed. Hence, when this word is used in a deed, the question is open *as to the intent of the grantor*." Fortunately, the words "to vest *absolutely*" occur here. As said by the circuit judge: "Mr. Blackstone, in 2 Comm. p. 104, in speaking of freehold estates of inheritance, uses 'absolutely' as synonymous with 'fee-simple.'" In *Rapalje & Lawrence's Law Dictionary*, in speaking of the owner of the estate in fee-simple, it is said he "is the absolute owner of land or other realty." The same dictionary, in speaking of the legal definition of the term "absolute," says the meaning is, "complete, final, perfect, unconditional, unrestricted."

But we are not left to this examination without some decisions from our court of last resort. In *Myers v. Anderson*, 1 Strob. Eq. 344, 47 Am. Dec. 537, after the bequest for life, the limitation was to the issue, to be their absolute property forever. The word "absolute" carried the fee. Chancellor Johnston, in delivering the opinion of the court, said: "It appears to the court that the testator in this case, by the gift to the issue, not only of the property or slaves, but of the absolute property in them (a term importing the quantity of interest intended to be given) has as effectually given them the fee (so to speak) as if the bequest had been made to the issue and their heirs, and that the gift of the absolute property or fee rebuts the idea that he intended," etc. In *McLure v. Young*, 3 Rich. Eq. 559, the court quoted approvingly the language in the foregoing case, and held the words after a life-estate, "to lineal descendants absolutely and for-

ever," to mean that such descendants took as purchasers. See the effect in this same direction of the case of *Moseley v. Hankinson*, 22 S. C. 323. The use of the five dollars paid by the trustee to the grantor is in support of this view. While it is true the only evidence of this payment is in the recital of the deed itself, yet the only person who could gainsay it would be a creditor of the grantor. It would certainly bind his heir so as to prevent a reverter. A very slight circumstance in the way of consideration, even if it be "a peppercorn," our own courts declare, will be sufficient evidence of the intention of the parties to carry the whole estate. * * *

BARNETT v. BARNETT.

(Court of Appeals of Maryland, 1912. 117 Md. 265, 83 Atl. 160, Ann. Cas. 1913E, 1284.)

Appeal from Circuit Court of Baltimore County.

Action between Amelia Emma Barnett and De Warren Beauregard Barnett and others. From the decree, Amelia Emma Barnett appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

STOCKBRIDGE, J. On December 5, 1888, Amelia Elizabeth Barnett executed her will for the express purpose of "making some disposition of my real estate." By this instrument she provided that, in the event of her husband surviving her, he should have entire control of the farm belonging to her on the Reisterstown turnpike road, in Baltimore county, comprising about 63 acres, but without the power to sell the farm or any part of it, or to permit it to be incumbered by debts or mortgages, or to depreciate from neglect, and with the further expressed wish that her unmarried children should "have a comfortable support from the proceeds of the farm." At her husband's death, and after all debts were paid, and the sum of \$3,000 paid to her daughter, Amelia Emma Barnett, her will continues as follows:

"Then an equal division of my property, or if sold, an equal division of proceeds among my five children, Amelia Emma Barnett, Estella

* It is familiar doctrine that a trustee will take a fee without words of inheritance when necessary for the purposes of the trust. See *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390 (1834), holding that the doctrine is a general one, and applies to trusts created by deed as well as to trusts created by will. And see *Packard v. Old Colony R. Co.*, 168 Mass. 92, 46 N. E. 433 (1897), holding that, where a deed in trust for a cemetery corporation required a legal estate in the trustees for a period beyond their own lives, they will take in fee, although no words of limitation to heirs were used. In *Allen v. Baskerville*, 123 N. C. 126, 31 S. E. 383 (1898), it is held, however, that where a deed falls to convey a title in fee to a trustee for a beneficiary which has no corporate existence (a certain academy), the court cannot supply the words, "and his heirs," after the name of the trustee, when there is no allegation that the words were omitted by mistake.

Virginia Barnett, Jessie Davis Barnett, De Warren Beauregard Barnett, Florence Lee Barnett, and in the event of the death of any of my children before the settlement of the estate, then their portion shall go to their children, but if they have no children, then their portion shall be equally divided among my surviving children, and to the children left by any of my other deceased children, should there be any. It is my desire that my children shall have their portion of my estate for their exclusive benefit or maintenance and at their death go to their children absolutely, but if any of my children should marry and die without children then their portion shall revert to my surviving children and children left by any of my deceased children."

Nine years after the execution of this will the testatrix executed a codicil in the following language:

"Finding portions of my original will not arranged to my entire satisfaction I desire to make some alterations.

"I desire all of my children to have absolute control of their portion of my estate. I also desire that my children shall be very guarded in advancing their money to anyone. Should any loan be made to secure themselves against loss and in the event of the death of any of my children without issue what remains of their portion shall revert to my living children and children of my deceased children should there be any.

"It is my express desire that there shall be no dissention among my heirs over the division of my estate, and I furthermore stipulate that my property shall not be forced into market and sacrificed, but shall be held at least five years unless they can all agree to dispose of same to advantage before the expiration of five years."

The testatrix died on the 1st July, 1900, leaving her husband surviving her, and he died in February, 1909. The children of the testatrix are all adults, and the record in this case discloses but a single question which this court is called to pass upon.

That question involves a construction of the will, and the determination whether the language of the will and codicil operate to vest in the children of the testatrix an absolute fee or a life estate only. The express terms of the will created in the husband of the testatrix a life estate which has now been terminated by his death. The limitation upon sale imposed by the concluding words of the codicil, being a time limitation of five years, has now expired, more than the stipulated period having passed since both the execution of the codicil and the death of the testatrix.

The rules of construction are simple and readily understood. Thus it has always been recognized that wills are to be construed more liberally than deeds, in order that the intention of a testator may be carried into effect, and therefore, in order to pass a fee, it is not necessary to make a strict use of technical expressions. Page on Wills, § 561. It is always the object of the court to ascertain, if possible, the intention of the testator, and to do that the particular situation of the testator, or

other circumstances which existed at the time of the execution of the instrument, are always proper subject-matters of consideration in connection with the language which is actually employed. *Henderson v. Henderson*, 64 Md. 185, 1 Atl. 72; *Levi v. Bergman*, 94 Md. 204, 50 Atl. 515.

The testimony in this case abundantly establishes the character of the relation which existed between Mrs. Barnett and her children to have been one of entire confidence. The subject-matter of the will and its provisions were talked over in the family as a matter of general interest and agreement prior to the execution of the will.

The provision for the life estate for her husband, if he survived her, was made in clear and apposite terms. It was only when she came to make the provision for the devolution of the property after his life estate that any question could arise. Even then it is by no means clear that it was the intent of the testatrix to create a life estate in the children, for the reason that express provision is made for a division of the proceeds of the property. But even if it be assumed that by reason of the strict construction of the language employed in the will there were created successive life estates in her husband, and then in her children, that doubt was entirely removed by the first paragraph of the codicil, where the language is plain and unmistakable. She there said: "I desire all of my children to have absolute control of their portion of my estate." It is true she does not use the words, "in fee," or "heirs," but the terms "absolute," or "absolute control," or "absolute disposal," have a well-defined signification in testamentary law. Thus it is said in the case of *Greenawalt v. Greenawalt*, 71 Pa. 487, that "absolute" is not a word used to distinguish a fee from a life estate, but to distinguish a qualified or conditional from a fee-simple estate; and in the will which was under construction in *Jackson v. Babcock*, 12 Johns. (N. Y.) 393, the term "absolute disposal," was held to vest a fee in the devisee. See, also, *Anders v. Gerhard*, 140 Pa. 153, 21 Atl. 253; *Dills v. Adams* (Ky.) 43 S. W. 680. And in the case of *Johnson v. McIntosh*, 8 Wheat. 588, 5 L. Ed. 681, it was said by Chief Justice Marshall that "an absolute must be an exclusive title, or at least a title which excludes all others not compatible with it." See, also, cases cited in 1 Words and Phrases, p. 38 et seq.

But even as further indicating the intention of the testatrix in this case, the concluding words of the codicil, where a limitation of time is sought to be placed upon any alienation of the property, the language of the testatrix clearly indicates a power of disposal even within that time by the agreement of all of the parties, an intention entirely inconsistent with the creation of a life estate, and, if the devise in this case were to be treated in the nature of a general devise with a power, it would come under the ruling of this court in the case of *Welsh v. Gist*, 101 Md. 606, 61 Atl. 665, where the late Chief Justice McSherry said: That if "an estate is given to a person generally or indefinitely, with a power of disposition, such gift carries the entire estate, and the devisee

or legatee takes, not a simple power, but the property absolutely." Without prolonging this opinion further, it is sufficient to say that the construction placed upon the will and codicil of Amelia Elizabeth Barnett by the circuit court for Baltimore county as set forth in the decree of July 22, 1911, was correct, and that decree will be affirmed.

Decree affirmed, costs to be paid out of the estate.*

* Although, at common law, the word "heirs" is not necessary in a devise for the purpose of passing the fee (*Bassett v. Nickerson*, 184 Mass. 169, 68 N. E. 25 [1903]). But see *Gannon v. Albright*, 183 Mo. 238, 81 S. W. 1162, 67 L. R. A. 97, 105 Am. St. Rep. 471 [1904]), yet the intention of the testator to create an estate of this character must be manifest from the will (*Little v. Giles*, 25 Neb. 313, 41 N. W. 186 [1889]). A devise in "fee simple" (2 Jar. Wills, 253), or to one "forever" (*Idle v. Cooke*, 2 Ld. Ray. 1144, 1152), has, for example, been held sufficient to pass the fee. Likewise, a devise of "all my estate" (*Webster v. Wiggin*, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510 [1895]); of "all my real estate" (*Boston Safe Deposit, etc., Co. v. Stich*, 61 Kan. 474, 59 Pac. 1082 [1900]); of my "land" (*Williams v. Parker*, 84 N. C. 90 [1881]), has been held sufficient to pass a fee. It has been held, however, that the use of the word "tenements" when used alone will not pass a fee. *Wright v. Page*, 10 Wheat. 204, 6 L. Ed. 303 (1825).

ESTATES IN FEE TAIL

I. Origin of Estates Tail ¹

EWING v. NESBITT.

(Supreme Court of Kansas, 1913. 88 Kan. 708, 129 Pac. 1131.)

Appeal from District Court, Johnson County.

Action by Thomas J. Ewing and others against William J. Nesbitt. Judgment for defendant, and plaintiffs appeal. Affirmed.

BURCH, J. In the year 1893 John Ewing made his will. The fourth paragraph reads as follows: "Fourth. I will and bequeath to my daughter, Mary A. Nesbitt, née Ewing, and to the heirs of her body, the south half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of section No. twenty-one (21), township thirteen (13), of range twenty-four (24), in Johnson county, Kansas."

Devises using the same language were made to the testator's other children, four in number. Besides these, the will contained four other devises, which were expressly stated to be "free and clear of all entailment," thus clearly indicating the intention of the testator to create estates tail by the phraseology employed in paragraph 4 and those like it. In 1895 John Ewing died, leaving as his heirs the five children, who were the beneficiaries of his will. The will was duly probated, the estate was administered and closed, and Mary A. Nesbitt entered into possession of the tract of land devised to her. In the year 1909 she died without having borne children, and was survived by her husband, William J. Nesbitt, who continued in possession of the land. Soon after Mary A. Nesbitt's death her brothers and sisters commenced an action of ejectment, and for rents and profits, against William J. Nesbitt, claiming to be owners in fee simple. He answered, claiming a one-fifth interest in the land, and praying for partition. Judgment was rendered for the defendant, and the plaintiffs appeal.

The will contained a residuary clause, in which the testator gave to his children surviving him, share and share alike, "all other property, goods, chattels, moneys, stocks, credits, and effects" of which he might die seised. The defendant claims that his wife was the donee of an estate tail; that the donor retained a reversionary interest in fee simple expectant upon the estate tail; that if, by virtue of the residuary clause of the will, this reversion was not disposed of it descended, upon the death of the donor, to his heirs, one of whom was his daughter, Mary A. Nesbitt; and that upon her death the defendant, as her surviving husband, took her share of the fee, which was one-fifth. If,

¹ For discussion of principles, see Burdick, Real Prop. § 32.

however, the residuary clause of the will was effectual to devise the reversion to the testator's children, Mary A. Nesbitt took a one-fifth interest, which, upon her death, descended to the defendant. Under either theory the defendant's claim to a one-fifth interest in the land is valid, if the law of this state recognizes estates tail as they existed under the common law of England at the time of the colonization of this country.

Under the early common law a grant to a man and the heirs of his body was a grant of a fee, on condition that he had heirs of his body. The fee so granted was designated a conditional fee. If the donee had no heirs of his body, the condition was not performed, and the land reverted to the donor. If heirs of the donee's body were born, the condition was regarded as performed, and the donee was at liberty to make a conveyance which would bar him, his issue, and the donor's reversion. He could likewise charge the land with rents and incumbrances which would bind his issue, and the estate was forfeitable for his treason. If the condition were performed, but the donee made no conveyance, the land descended, upon his death, to the specified issue, who were at liberty to convey. If they made no conveyance, the land reverted to the donor. If the condition were performed, but the issue died, and the donee then died without having made a conveyance, the land reverted to the donor. In order to bar the possibility of reverter to the donor and to restore the descent to its ordinary course under the common law, donees of conditional fees were in the habit of making conveyances as soon as issue was born and taking back warranty deeds.

To stop this practice, which evaded the condition and defeated the intention of the donor, the nobility of the realm, who were desirous of perpetuating family possessions, procured the passage of the statute of Westminster II, known as the statute "*de donis conditionalibus*." 13 Ed. I, c. 1, June 28, 1285. This statute took away the power of alienation, and declared that the will of the donor, plainly expressed, should be observed, and that tenements given to a man and the heirs of his body should go to his issue if there were any, and, if not, should revert to the donor. The judges interpreted this statute to mean that the donee no longer took a conditional fee capable of being disposed of as soon as issue was born, but that he took a particular estate, denominated an estate tail, and that, instead of a possibility of reverter only remaining in the donor, he had a reversion in fee simple expectant upon the failure of issue. Some of the social consequences of this statute are thus described by Blackstone: "Children grew disobedient when they knew they could not be set aside; farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then, under colour of long leases, the issue might have been virtually disinherited; creditors were defrauded of their debts; for, if a tenant in tail could have charged his estate with their payment, he might also have defeated his issue by mortgaging it for as much as it was worth; innumerable latent entails were produced to deprive purchasers of the

lands they had fairly bought, of suits in consequence of which our ancient books are full; and treasons were encouraged, as estates tail were not liable to forfeiture longer than for the tenant's life. So that they were justly branded as the source of new contentions and mischiefs unknown to the common law, and almost universally considered as the common grievance of the realm." 2 Commentaries, *116. Notwithstanding these mischiefs, the statute forms one of the fundamental institutes of the land law of England, which three and a quarter centuries later was transplanted in the New World.

Before the settlement at Jamestown in the fourth year of James I (1607), a number of statutes had been passed whereby the privileges attending estates tail were much abridged. They were made forfeitable for treason. 26 Henry VIII, c. 39. Certain leases by the tenant in tail, not prejudicial to the issue, were allowed to be good in law. 32 Henry VIII, c. 28. The statute of fines (4 Henry VII, c. 24) was construed to permit the tenant in tail and his heirs to be barred by levying a fine. 32 Henry VIII, c. 36. Such estates were chargeable with the payment of certain debts due the king (33 Henry VIII, c. 39), and by construction of the statute 43 Eliz. c. 4, an appointment to charitable uses by a tenant in tail was held to be good. 2 Bl. Com. 117 et seq. The most serious blow, however, to the evils fostered by estates tail under the statute *de donis* was struck by a bold piece of judicial legislation. In *Taltarum's Case*, reported in Year Book, 12 Edw. IV, 19 (1472), the judges, upon consultation, held that a common recovery suffered by a tenant in tail accomplished the complete destruction of the estate tail.

This mode of barring estates tail is thus described in 1 Washburn on Real Property (6th Ed.) § 186: "This was a fictitious suit, brought in the name of the person who was to purchase the estate, against the tenant in tail, who was willing to convey. The tenant, instead of resisting this claim himself, under the pretense that he had acquired his title of some third person who had warranted it, vouched in, or by a process from the court, called his third person, technically the vouchee, to come in and defend the title. The vouchee came in as one of the *dramatis personæ* of this judicial farce, and then, without saying a word, disappeared and was defaulted. It was a principle of the feudal law, adopted thence by the common law, that if a man conveyed lands with a warranty, and the grantee lost his estate by eviction by one having a better title, he should give his warrantee lands of equal value by way of recompense. And as it would be too barefaced to cut off the rights of reversion, as well as of the issue in tail, by a judgment between the tenant and a stranger, it was gravely adjudged, first, that the claimant should have the land as having the better title to it; and second, that the tenant should have judgment against his vouchee to recover lands of equal value, on the ground that he was warrantor, and thus, theoretically, nobody was harmed. If the issue in tail or the reversioner or remainderman lost that specific estate, he was to have one

of equal value through this judgment in favor of the tenant in tail; whereas, in fact, the vouchee was an irresponsible man, and it was never expected that he was anything more than a dummy in the game. The result of this, which Blackstone calls 'a kind of *pia fraus* to elude the statute de donis,' was that the lands passed from the tenant in tail to the claimant in fee simple, free from the claims of reversioner, remainderman, or issue in tail, and he either paid the tenant for it as a purchaser, or conveyed it back to him again in fee simple."

The precedent of fictitious suits as means of acquiring or conveying property was found in the Roman law, and the practice of resorting to them was supposedly introduced in England by the clergy to evade the statute of mortmain. Spence's *Equitable Jurisdiction of the Court of Chancery*, 114, note. The solemn piece of jugglery already described later became more involved. "Complex, however, as the proceedings above related may appear, the ordinary forms of a common recovery in later times were more complicated still; for it was found expedient not to bring the collusive action against the tenant in tail himself, but that he should come in as one vouched to warranty. The lands were therefore, in the first place, conveyed, by a deed called the recovery deed, to a person against whom the action was to be brought, and who was called the tenant to the præcipe or writ. The proceedings then took place in the Court of Common Pleas, which had an exclusive jurisdiction in all real actions. A regular writ was issued against the tenant to the præcipe by another person, called the demandant; and the tenant in tail was then vouched to warranty by the tenant to the præcipe. The tenant in tail, on being vouched, then vouched to warranty in the same way the crier of the court, who was called the common vouchee. The demandant then craved leave to imparl or confer with the last vouchee in private, which was granted by the court; and the vouchee, having thus got out of court, did not return, in consequence of which judgment was given in the manner before mentioned, on which a regular writ was directed to the sheriff to put the demandant into possession." Williams on Real Property (17th Ed.) 108.

In all cases there was an agreement or understanding that the person who acquired an estate tail by means of a common recovery should pay for it, or convey it to the original tenant in tail in fee simple, or dispose of it as such tenant might direct. The result was that estates tail and all remainders over and the reversion were effectually barred. As Blackstone said, by long acquiescence and use these recoveries came to be looked upon as a legal mode of conveyance, by which a tenant in tail might dispose of his land. 2 Com. 117. This right of conveyance became, in contemplation of the law, an inherent and inseparable incident of an estate tail, and covenants and conditions attempting to restrain the exercise of the right were held to be void. 2 Washburn on Real Property, 188. The same purpose was accomplished by the equally fictitious proceeding of fine.

In the fourth volume of his Commentaries (14th Ed.) *14, Chancellor Kent said: "Estates tail were introduced into this country with the other parts of the English jurisprudence, and they subsisted in full force before our Revolution, subject equally to the power of being barred by a fine or common recovery." These estates are now very generally changed by legislation into fee simples, or reversionary estates in fee simple, or may be converted into fee simples by ordinary conveyance. 2 Bl. Com. 119, Cooley's note. In the pages following the above quotation from Kent, much of this legislation is referred to.

The territorial Legislature of 1855 passed an elaborate act relating to conveyances. Stat. of Kan. Terr. 1855, c. 26. Section 5 of this act reads as follows: "That from and after the passage of this act, where any conveyance or devise shall be made whereby the grantee or devisee shall become seised in law or equity of such state, in any lands or tenements, as under the statute of the thirteenth of Edward the First (called the statute of entails), would have been held an estate in fee tail, every such conveyance or devise shall vest an estate for life only in such grantee or devisee, who shall possess and have the same power over and right in such premises, and no other, as a tenant for life thereof would have by law; and upon the death of such grantee or devisee, the said lands and tenements shall go and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common, in fee; and if there be only one child, then to that one, in fee; and if any child be dead, the part which would have come to him or her shall go to his or her issue; and if there be no issue, then to his or her heirs."

This, of course, constituted a deliberate legislative modification of the common law relating to estates tail. In 1859 the territorial Legislature completely revised the act of 1855, relating to conveyances, making radical changes in its substance, and content. Laws 1859, c. 30. The subject-matter of the section quoted was entirely omitted, and nothing whatever was substituted for it, either in the revision or in any other statute. The result was that section 5 was repealed by implication; and, since the Legislature had its attention specially directed to estates tail by that section the purpose evidently was to restore the common law on the subject. This intention is made more apparent by the passage of the following act at the same session: "The common law of England and all statutes and acts of Parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States and the act entitled 'An act to organize the territory of Nebraska and Kansas,' or any statute law which may from time to time be made or passed by this or any subsequent Legislative Assembly of the Territory of Kansas, shall be the rule of action and decision in this territory, any law, custom or usage to the contrary notwithstanding." Laws 1859, c. 121, § 1.

The Constitution, adopted in July, 1859, under which the state was

admitted to the Union on January 31, 1861, contains nothing which bears upon the subject, either directly or remotely; and the Legislature has not since dealt with it. Nothing is to be found in the acts relating to conveyances, descents, and distributions, or wills, incompatible with the existence of such estates; and in their unfettered form such estates are not out of harmony with the conditions and wants of the people of Kansas. On the other hand, they exactly meet the requirements of testators in the situation of John Ewing. He desired to give his daughter an estate for life, in order to secure to her a home and some measure of comfort and welfare while she lived. After that he desired that the remainder should go to her children in fee. But he did not desire that his son-in-law should take the whole gift should she die childless, to be enjoyed by him and, perhaps, a strange second wife and their children. The court knows of no reason in law, morals, or public policy why these sentiments should not be respected, and they were clearly and fully expressed by the language of the will, interpreted by the common law. The overweening propensity to perpetuate family name and family property which made estates tail so obnoxious in the middle ages is fairly curbed by the right of a tenant in tail to convert his tenancy into a fee simple, and is not a menace to the general welfare of the people of this state; and it will be remembered that this right became one of the characteristics of the estate.

Fines and recoveries, however, are not adapted to any of our needs, are inconsistent with the Code of Civil Procedure, and consequently cannot be resorted to, as portions of the common law, in aid of the general statutes of this state. Gen. Stat. 1909, § 9850. The effect of these indirect, fictitious, and operose proceedings was merely that of a deed of record, and the same end may now be accomplished by an ordinary conveyance. The fiction and the form alone are obsolete. The substance of the proceeding (a conveyance) and the essential character of the estate tail (the right to convert the estate into a fee simple by a conveyance) are preserved. If, therefore, Mary A. Nesbitt had chosen, in her lifetime, to make a conveyance of the land devised to her, she would thereby have barred herself, her issue, born and unborn, and her father's reversion.

While the mere possibility of a reverter such as attended conditional gifts under the ancient common law is not a subject of disposal by will, reversions in fee under the statute *de donis* may be devised. The result is that Mary A. Nesbitt was given by the will an estate tail in the land in controversy. She also took, by virtue of the residuary clause of the will, one-fifth of the reversion in fee expectant upon her death without issue. Upon her death this interest passed to her husband, the defendant.

The judgment of the district court is affirmed. All the Justices concurring.

II. Classification of Estates Tail *

1. ESTATES IN TAIL SPECIAL

WEART v. CRUSER.

(Court of Errors and Appeals of New Jersey, 1887. 49 N. J. Law, 475, 13 Atl. 36.)

Error to supreme court.

The action was in ejectment, and brought to recover an equal one-eighth part of a farm in the county of Somerset. The cause was tried in the Somerset circuit without a jury. Judgment was rendered in favor of the plaintiff, and the following reasons were assigned for the judgment by Magie, J.:

"The cause is of such importance as to justify and demand a statement of the views of the court on the legal question presented. That question respects the title which Matthias Van Dike Cruser, the father of the plaintiff, took under the will of Frederick Cruser, deceased. If the title was or became a fee-simple, then the defendant must succeed. If the title, under the statute of 13 Edw. I., (called the 'Statute of Entails,') was a fee-tail, then the plaintiff has a right to recover. The solution of the question depends on the construction of the following clause of the will of Frederick Cruser, deceased, viz.: 'I give and devise unto my son, Matthias Van Dike Cruser, his heirs and assigns by his present wife, Sally Ann, forever, the farm,' etc. ,

"The argument of defendant's counsel was mainly directed in the line of two opinions given by eminent counsel respecting the true construction of this clause. Both these opinions have been before me, and have received, as they deserve, most careful consideration. The opinion of Mr. Bradley, now associate justice of the supreme court of the United States, was given in 1866. He first takes the position that the clause in question contains no words of procreation, nor any equivalent words, and that its words do not necessarily imply the descendants of the devisee, for, he says, 'the heirs of M. V. D. C. by his present wife, Sally Ann, must be descended from her, but need not necessarily be descended from him; for if he should die first, and his wife should marry his next cousin, and have issue, this issue might become the collateral heirs of M.' He then likens the estate devised to a qualified fee, which he described as being, in the language of Mr. Preston, an interest given in its first limitation to a man, and to certain of his heirs, and not extended to all of them generally, nor confined to the issue of his body. He then concludes that the limitation of this clause, restricting the descent to such of the heirs of M. V.

* For discussion of principles, see Burdick, Real Prop. § 33.

D. C. as should be descendants of Sally Ann, his wife, creates a source of descent different from that prescribed by our laws, and so is repugnant to the estate granted to M. V. D. C., and void. This conclusion seems to indicate that the estate which M. V. D. C. took was a fee-simple. The foundation of this conclusion is evidently the alleged lack of words of procreation, or words of equivalent meaning. His contention is that the words, 'heirs of M. V. D. C. by his present wife, Sally Ann,' do not necessarily import the issue of M. V. D. C. If this premise is incorrect, the conclusion must be rejected. I feel constrained to regard the words as entirely equivalent to 'heirs of the body of M. V. D. C. by his present wife, Sally Ann.' This instrument to be construed is a will. What we are to ascertain is the intent of the testator. No one who reads the clause will doubt that his intent was to limit the estate to the issue of M. V. D. C. by Sally Ann. The books are full of illustrations of precisely similar inferences of intent, drawn from the use of similar language. Thus, in *Den v. Cox*, 9 N. J. Law, 10, the phrase, 'his lawfully begotten heir,' was held to create an estate tail, and to be equivalent to 'lawfully begotten heir of his body.' Yet the words did not necessarily import the issue of the devisee and would have been entirely satisfied by a descent to any heir lawfully begotten, though not of his issue. The words 'heirs male,' in a devise, have always been held to import heirs of the body; and yet they would be entirely satisfied by any male heirs, lineal or collateral. *Den v. Fogg*, 3 N. J. Law, 819. These illustrations might be indefinitely multiplied. The present case is not without precedent, and the view I have taken is not without the support of authority. In *Vernon v. Wright*, 7 H. L. Cas. 49, a devise to 'the right heirs of my grandfather by Mary, his second wife, forever,' was held to create an estate tail. The words were said to comprehend words of procreation, and to be equivalent to heirs of the body of the grandfather, begotten on the body of the wife named. In *Somers v. Pierson*, 16 N. J. Law, 181, a devise to J. S., and 'to his heirs by his present wife, Anne,' was held to create an estate tail. The opinion was by Ford, J., and concurred in by Hornblower, C. J. The judgment of the supreme court was afterwards reversed by the court of errors; but no opinion seems to have been delivered, and the reversal was in 1841. It is not necessary to infer that the reversal went on the ground that the construction given to this clause by the supreme court was erroneous. There was a subsequent clause in the will then under consideration which provided that the lands devised were, after the death of the widow, to whom they were given for life, to 'cede to J. S., his heirs and assigns, to all intents and purposes.' It was contended in the supreme court that this clause controlled and passed a fee-simple. We may fairly presume the same contention was made in the court of errors, and the reversal was probably on that ground. The case therefore, is not without weight. Upon these grounds, I think the

words of this clause are to be taken as including the idea of procreation, and as meaning 'heirs of the body' of M. V. D. C. by his wife, Sally Ann.

"The other opinion was by A. O. Zabriskie, afterwards chancellor. His conclusion is that M. V. D. C. took an estate in fee-simple. This conclusion is put upon the force of the word 'assigns,' which, he insists, indicates a clear intention to give to M. V. D. C. a power to sell. The remaining part of the devise, he thinks, would have its due effect if held to mean that, if M. V. D. C. should die without having sold the farm, his heirs by his wife, Sally Ann, would take as purchasers. He admits that, unless that construction be given, the clause will come literally within the eleventh section of the descent act, which provides for the disposition of estates which would be estates tail under the statute of entails. But he suggests that an estate tail special is not within that section, because, as he well observes, a literal application of the sections to such estates will invariably thwart the will of the testator. This suggestion need not be considered, because, in *Zabriskie v. Wood*, 23 N. J. Eq. 541, the court of errors expressly decided that the eleventh section did apply to all estates tail, whether general or special. The force attributed by Mr. Zabriskie to the word 'assigns,' in this clause, is, in my judgment, excessive and inappropriate. In *Den v. Wortendyke*, 7 N. J. Law, 363, the question was whether an estate in fee or in tail passed under a clause of a will, and the same contention was made. Chief Justice Kinsey uses the following language: 'In the outset, I will remark that little or no importance is to be attached to the use of the word "assigns," in this case; a circumstance upon which a considerable part of the argument was founded. I am not aware of a single case wherein, a certain interest having been given in a will, this word has been held to enlarge, or in any manner to affect, this interest. Every interest recognized by the law, unless under particular circumstances, is the object of an assignment. It belongs essentially to every species of interest or property; and the introduction of the term is, therefore, in every case, superfluous and inoperative in a conveyance of property. The first section of Littleton shows that the word has no enlarging power in a conveyance, and Coke * * * shows that it is the same in a case of a will. The argument, therefore, resting on the basis, is entitled to no consideration.' In the section referred to by the learned chief justice, Littleton declares that a purchase by the words, 'to have and to hold to him and his assigns forever,' would only pass an estate for life. Coke, in his Commentary, says that a devise 'to him and to his assigns forever' will pass a fee-simple by the intent of the devisor. But it is plain that this intent is drawn, not from the use of the word 'assigns,' but the use of the word 'forever;' for he adds that under a devise 'to one and his assigns,' without saying 'forever,' the devisee hath but an estate for life. Co. Litt. 96. In *Lutkins v. Za-*

briskie, 21 N. J. Law, 337, on a devise to A., and to her heirs lawfully from her body begotten, and assigns, forever, it was contended that A. took a fee-simple, and, among other reasons, because of an intention to be inferred from the use of the word 'assigns.' Chief Justice Hornblower held that the word 'assigns' had never been considered sufficient to control previous words of limitation. Upon these cases it seems to me the word relied on has never been applied to enlarge an estate under the circumstances such as appear in this case. The force attributed to the word is inappropriate, because, in any event, the estate taken by M. V. D. C. was vendible and assignable. Under such circumstances, there is no inference to be drawn except of an intent to pass a vendible and assignable estate.

"It was contended on the argument that the word 'forever,' in this clause, tended to the same construction reached by Mr. Zabriskie. But, although this word often operates to indicate an intent to create a fee-simple, yet it will not operate to create or impede the creation of an estate tail. Such was the view of Chief Justice Ewing in *Den v. Cox*, 9 N. J. Law, 10, and the cases there cited, and many others sustain that view. In *Vernon v. Wright*, ubi supra, Crowder, J., expresses the same view and says the word would not enlarge the limitation of the estate tail, but only import its continued duration. The result is that, in my judgment, the plain intent of testator was to create an estate which, under the statute of 13 Edw. I., commonly called the 'Statute of Entails,' would have been an estate in special tail. Upon the authority of *Zabriskie v. Wood*, ubi supra, that estate fell within the provisions of section 11 of the descent act, and became an estate for life in M. V. D. C., the devisee, with remainder to his children in fee-simple. See also *Redstrake v. Townsend*, 39 N. J. Law, 372.

"It was suggested on the hearing that there might be a question, under section 11, as to the amount of estate to which plaintiff would be entitled. He is one of seven children of M. V. D. C. by his wife, Sally Ann. M. V. D. C. had a child by a previous wife. If the last-named child obtains an interest under section 11, it is plain that the intention of the testator is not regarded. But the question is not before me, because plaintiff only claims one-eighth of the land. If before me, the case of *Zabriskie v. Wood*, ubi supra, settles it, for in that case the statute was so construed as to cast the devised estate upon a child to whom it was the evident intent of the testator that the estate should not pass. I am therefore constrained to find for the plaintiff, and that he is entitled to judgment for the lands claimed, etc., and his costs of suit," etc.

A writ of error was brought to remove the judgment and proceedings to this court.

PER CURIAM. The judgment in this case should be affirmed, for the reasons given by the court below. Unanimously affirmed.

III. The Barring of Estates Tail *

See *Ewing v. Nesbitt*, ante, p. 39.

IV. Estates Tail in the United States †

1. EFFECT OF STATUTES

See *Weart v. Crusier*, ante, p. 45.

* For discussion of principles, see *Burdick*, Real Prop. § 36.

† For discussion of principles, see *Burdick*, Real Prop. § 38.

ESTATES FOR LIFE

I. Life Estates Defined ¹

See *Cummings v. Cummings*, post, p. 75.

II. Rights and Liabilities of Life Tenant ²

MISSOURI CENTRAL BUILDING & LOAN ASS'N v. EVELER.

(Supreme Court of Missouri, Division No. 1, 1911. 237 Mo. 679, 141 S. W. 877, Ann. Cas. 1913A, 486.)

Appeal from Circuit Court, Cole County; W. H. Martin, Judge.

Action by the Missouri Central Building & Loan Association against John B. Eveler and others, minors, and Nellie A. Eveler, an adult. From a judgment for defendants, plaintiff appeals. Affirmed.

GRAVES, P. J. Cast upon demurrer below, the plaintiff stood upon its petition, and after such adverse judgment upon the demurrer brings the case here by appeal. Learned counsel for the plaintiff has made a very concise statement of the case, which statement is adopted in the brief by learned counsel for the defendants. We shall likewise adopt such statement. In words, it is as follows:

"The petition alleges, and the demurrer admits, that in the year 1901, Herman Eveler, being in possession of a part of certain inlots in Jefferson City, Missouri, described in the petition, applied to plaintiff for a loan of \$800 on said property, representing himself to be the owner thereof in fee simple; that in the year 1903, under the same representations, he applied to plaintiff for a further loan of \$600 on said property, and in the year 1904, under like representations, he applied to plaintiff for a further loan of \$400 on said property; that plaintiff, believing said representations of ownership to be true, and believing that the said Herman Eveler was the owner, in fee simple, of the property, granted the loans thus applied for, amounting in all to \$1,800, and took the said Eveler's notes for said amounts of \$800, \$600, and \$400, said notes being secured by deeds of trust on said property, executed by the said Herman Eveler and his wife, defendant Nellie A. Eveler; that all of the money so loaned by plaintiff to the said Herman Eveler was used by him in making lasting and permanent improvements on said property, which resulted in greatly increasing the rental and market value thereof; that the improve-

¹ For discussion of principles, see *Burdick*, Real Prop. § 40.

² For discussion of principles, see *Burdick*, Real Prop. § 44.

ments so made consisted in the building of another story on the two-room brick house theretofore standing on the land, and in erecting on the same land a seven-room, frame, two-story building; the former being occupied by the defendants as a home, and the latter being rented by defendants at \$29 per month. The petition further alleges that Herman Eveler died in May, 1907, leaving as his only children the minor defendants, and his widow, defendant Nellie A. Eveler, and that since his death defendants have enjoyed the rents and profits of all the buildings erected with the money so borrowed from plaintiff as aforesaid; that no payments have been made on said loans since the death of the said Eveler, and that there is now due plaintiff on said loans the sum of about \$1,380.70; that it now appears that the said Eveler's representations of fee-simple title in himself were untrue; that by the terms of his father's will, under which he was in possession and claimed said property, the said Herman Eveler never had the fee-simple title to said property, but had only a life estate therein, and that on his death the fee-simple title to said property vested in Eveler's children, the minor defendants herein. The petition further states that defendants refuse to make any further payments upon the loans; that plaintiff is remediless at law, and prays the court, in the exercise of its chancery powers, to ascertain the amount yet due plaintiff, to declare such amount a lien upon the improvements, and to adjudge that the frame building now standing upon the minor defendants' land be subjected to the payment of plaintiff's debt in such way as to the court may seem best; and for such other proper and equitable relief as to the court may seem proper. Defendant Nellie A. Eveler demurred to the petition, on the ground that she was not a necessary party defendant, and the minor defendants demurred, on the ground that the petition did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrers, and, on plaintiff's declining to plead further, rendered judgment for defendants, whereupon plaintiff duly appealed to this court."

The facts disclosed by this record show a hard case for the plaintiff, but has it any redress in a court of equity? We think not. The good faith of plaintiff in loaning this money may be conceded, and by the demurrer is conceded, yet that does not avail the plaintiff in a case environed as is this case. With the money borrowed, the deceased life tenant made valuable improvements upon the lands, but under the facts this cannot avail as against these remaindermen. The father, the life tenant, could not by trust deed incumber the estate of these minors. His conveyance conveyed no more than the estate which he held, i. e., the life estate. This is the legal status, and, in our judgment, equity cannot relieve the legal situation. If life tenants could borrow money, whether upon deeds of trust or otherwise, with which to improve the estate of remaindermen, and the parties loaning the money could show that it went into actual improvements, and for

that reason be adjudged a lien upon the property or any part thereof, estates in remainder would certainly be left in a precarious situation. Remaindermen would be at the mercy of the life tenant. Such would be a dangerous precedent, and one which we do not feel called upon to set.

When the plaintiff loaned these sums of money to the life tenant, it did so with the constructive notice imparted by the will of the life tenant's father. That the title was defective could have been ascertained and this lawsuit averted is evident. The situation is harsh, but was not made by these defendants. The widow of the life tenant has no interest in the controversy, and as to her the demurrer was certainly well taken.

Going now to the remainderman, we take it as well settled that a life tenant cannot charge the corpus of the estate with improvements. What he himself cannot do cannot be done by those from whom he borrows money for that purpose.

In a recent Kentucky case (*Frederick v. Frederick's Adm'r*, 102 S. W. 859, 31 Ky. Law Rep., loc. cit. 584, 13 L. R. A. [N. S.] 514), it is said: "It is a familiar rule that the life tenant cannot charge the corpus of the estate with improvements, and that he is not entitled to compensation for the enhancement of the property by reason of his improvements. *Henry v. Brown*, 99 Ky. 13, 34 S. W. 710. We do not see that there is anything in this case to take it out of the rule. If the improvements had been made by Mrs. Frederick, the life tenant, they would not be a charge upon the estate. They are certainly no more a charge upon the estate when made by her husband. * * * It is a sound rule of public policy which denies the life tenant the power to charge the estate for his improvements, although they may enhance the value of the property."

The above case is also reported in 13 L. R. A. (N. S.)-at page 514, where it is made the subject of a very lengthy note, in which are collated numerous authorities. The learned annotator thus announces the general rules: "It is the general rule that a life tenant has no right to recover from the remainderman for improvements made during the continuance of the life estate." "And it is also the well-established law that no charge upon the lands or the inheritance can be made for such improvements." "The court, in *Caldwell v. Jacob*, supra [22 S. W. 436, 27 S. W. 86, 16 Ky. Law Rep. 21], gives two reasons for this rule: First, preventing the life tenant from consuming the interest of the remainderman by making improvements that the remainderman cannot pay for, or that he does not desire; second, improvements are made for the immediate benefit of the life estate, and usually without reference to the wishes of the remainderman."

In 16 Cyc. p. 631, the rule is thus stated: "If the life tenant himself makes permanent improvements, it will be presumed that they were for his own benefit, and he cannot recover anything therefor from the

remainderman or reversioner. Exceptions to this rule have been made in the case of a life tenant who completes a dwelling house begun by the donor of the estate, or who makes improvements upon mining property to prevent its forfeiture. A life tenant who makes improvements, believing himself to be the owner in fee, is not entitled to the benefit of the betterment or occupying claimant laws."

There are exceptions to these general rules, as will be disclosed by the collation of cases under the *Frederick Case*, supra, in 13 L. R. A. (N. S.) p. 514 et seq., but the facts of this case do not bring it within the exceptions found in the cases there cited. In the case at bar, the remaindermen were all infants. They could not assent to the contract made by their father, the life tenant, and they are in no way estopped by their own conduct.

It is also the general rule that one holding under the life tenant is entitled to no more consideration than the life tenant. Vide authorities collated in note to the *Frederick Case*, supra, 13 L. R. A. (N. S.) loc. cit. 516. Among the cases there cited is the case of *Schorr v. Carter*, 120 Mo. 409, 25 S. W. 538. In the *Schorr Case*, the action was one in ejectment by a remainderman. Defendants had possession and claimed title through a conveyance from the life tenant. It was urged that defendants were at least entitled to recover for repairs made to the property, and have such offset against the damages for the unlawful holding. This court said: "Defendants were not entitled to a reduction of damages for outlays expended in the preservation of the property, and the court committed no error in excluding all evidence with respect thereto."

With the general trend of the authorities as we find them, we are unwilling to establish a precedent in this state, by which the interests of minor remaindermen may be frittered away by a life tenant. Plaintiff, by the exercise of that care which is required of one taking a conveyance of real estate, could have discovered the exact status of the title in this property. Defendants did nothing to induce action upon part of plaintiff. They were minors, and could do nothing which would bind them.

The judgment of the trial court is right, and is therefore affirmed. All concur.³

³ See, also, *Higgins Fuel & Oil Co. v. Snow*, ante, 10. The husband of a life tenant, who makes improvements on the estate, cannot recover from the remainderman. *Creutz v. Hell*, 89 Ky. 429, 12 S. W. 926 (1890). In *Broyles v. Waddel*, 11 Heisk. (Tenn.) 32 (1872), it is held that, where the tenant for life is also a tenant in common of the remainder, he will be allowed, on partition with his cotenants, compensation for improvements made during the continuance of the life estate. And see *Gambrill v. Gambrill*, 3 Md. Ch. 259 (1853), where a life tenant who had made permanent improvements was allowed to recover the value of such improvements out of the proceeds of the sale of the property, the sale being under order of the court. In Arkansas, a statute permits a life tenant to recover for improvements made under the belief that he was the owner in fee. See *Bloom v. Strauss*, 70 Ark. 483, 69 S. W. 548 (1902).

LIFE ESTATES ARISING FROM MARRIAGE

I. Estate During Coverture ¹

ROSE v. ROSE.

(Court of Appeals of Kentucky, 1898. 104 Ky. 48, 46 S. W. 524, 41 L. R. A. 353, 84 Am. St. Rep. 430.)

Appeal from circuit court, Logan county.

Action by Billie Rose, by next friend, against J. A. Rose, and others, to recover the possession of land. Judgment for defendants, and plaintiff appeals. Affirmed.

PAYNTER, J. It appears from the petition, to which the court sustained a demurrer, that the appellant is the wife of appellee J. A. Rose; that they were married in the year 1890; that a separation has taken place, which is permanent; that they will never live together as husband and wife. It also appears from the petition that after the marriage took place, and before the passage of the act of 1894 (sections 2127, 2128, Ky. St.), defining the rights of married women, the appellant by gift acquired title to a tract of land containing 308 acres, and by purchase another tract of 120 acres. It is alleged that the husband is in possession of this land, and refuses to surrender it to the appellant. She therefore prays that the possession of it be adjudged to her. The question involved is whether, under the act referred to, the rights of the husband—as they existed at the time of its passage—to the use of the land have been destroyed; that is to say, did the legislature intend to deprive husbands of their interests in the lands of their wives, or, if it so intended, did it have the power to do so?

At common law the husband became the owner of the personal property of the wife. He likewise became seised in an estate for their joint lives of her freehold lands and chattels real. He could sell the personal property thus acquired, and vest the vendee with a title thereto. He could sell the interest which he acquired in the real estate, and vest the purchaser with the title to the interest which became vested in him by operation of law. 2 Dembitz, Land Titles, 788; 2 Kent, Comm. 130; 2 Bl. Comm. 126. The court held in McClain v. Gregg, 2 A. K. Marsh. 804, that marriage gives the husband an estate in the lands of his wife, which he could sell, and that his vendee could maintain ejectment. That opinion was before an act of the legislature reducing the interest of the husband in the wife's land. A divorce restores to the wife the exclusive right to her land. Hays v. Sanderson, 7 Bush, 489. As civilization advanced, and as the men who made the laws began to recog-

¹ For discussion of principles, see Burdick, Real Prop. § 47.

nize that a wife should not be compelled to surrender practically all of her estate to the husband, but should be given a reasonable protection in the enjoyment of her property, the legislature of Kentucky passed an act which supplanted the common law with reference to the rights of a husband in his wife's real estate. It is section 1, art. 2, c. 52, p. 720, Gen. St., and reads as follows: "Marriage shall give to the husband, during the life of the wife, no estate or interest in her real estate, including chattels real, owned at the time, or acquired by her after marriage, except the use thereof, with power to rent the real estate for not more than three years at a time, and receive the rent. If, however, the wife die during the term for which her land is rented, the rent shall go to the husband, if alive, subject to her debts, contracted as stated in the next section. But if during such term the husband die, the rent accruing thereafter shall go to the wife or her representatives, subject to her debts as aforesaid." This section was in force at the time the parties to this action were married, and at the time the wife acquired the land. It gives the husband the use of the wife's land, with power to rent it for not more than three years at a time, and receive the rent. It does not allow this rent to be subjected to the payment of his debts, because the legislature thought it wise to place it in the power of the husband to appropriate the rents for the benefit of his wife and children, if he chose to do so.

In obedience to the requirements of the statute, this court has repeatedly held that the rents of the wife's land could not be subjected to the payment of the husband's debts. If the husband cultivates the land himself, then the products of the land have been adjudged to belong to him. The court, in *Moreland v. Myall*, 14 Bush, 474, held that corn standing on the wife's land (her general estate) is subject to levy and sale under execution against the husband. While the rent of the wife's land is not liable for the husband's debts, yet, as between the husband and wife, the rent belongs to him. *Barnes v. Burbridge*, 7 Ky. Law Rep. 445. While, under the act in force when the parties married and when the land was acquired, the husband's interest in the wife's land was not so great as at common law, still it is a vested right; and the legislature could not deprive him of the use of his wife's land, and the right to rent it for three years at a time. The act of 1894 declares that marriage shall give to the husband no interest in the wife's property, and that she shall hold it and own it for her separate and exclusive use, free from the debts and control of her husband. The act is not retrospective in its operation. It cannot take from a husband the rights which existed under the law in force at the time of its passage. It is said by Mr. Cooley, in his work on Constitutional Limitations (5th Ed. p. 442): "At the common law the husband, immediately on the marriage succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent alteration in the law could not take them away." It is held in *Railroad Co. v. Harris*, 9 Ind. 184, 68 Am. Dec.

618, that a husband's estate in the wife's land is not impaired by a statute declaring it separate property. Under the law of New York, a husband had a certain interest in his wife's property. Subsequently the legislature passed an act which, in effect, declared that such property should no longer belong to the husband, but should become the property of the wife, as though she were a single female. The court held that the husband's rights could not be impaired by the act of the legislature. *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160.

—It was held in *Rose v. Sanderson*, 38 Ill. 247, that a legislative enactment cannot take from the husband a vested life estate in the wife's land, and give it to her. Bishop on the Law of Married Women (volume 2, § 40), after stating what are the rights of the husband at common law in the wife's real estate, says: "This is a vested estate in him; and, within the doctrine discussed under our first subtitle, it is not competent for legislation, without his consent, to take it from him and give it back to the wife." The views we have expressed are supported by *Jackson v. Jackson*, 144 Ill. 274, 33 N. E. 51, 36 Am. St. Rep. 427; *Clark v. Clark*, 20 Ohio St. 135; *Wyatt v. Smith*, 25 W. Va. 813. Many authorities could be cited in support of these views. A wife who was married before the act of 1894 took effect is entitled to all the rights in property acquired after the act took effect which it purports to give her. Although the marriage took place before the act took effect, the husband has no right to complain that the legislature has given his wife the control of such property as she acquired after the act took effect. The act did not impair any vested right of the husband in property so acquired. His right was expectant, not vested. Mr. Cooley in his work on Constitutional Limitations (page 443), in speaking in regard to the husband's expectant interest in the after-acquired property of the wife, said: "It is subject to any changes made in the law before his right becomes vested by the acquisition." In *Allen v. Hanks*, 136 U. S. 300, 10 Sup. Ct. 961, 34 L. Ed. 414, it was held competent for a state, in its fundamental law or by statute, to provide that all property thereafter acquired by or coming to a married woman shall constitute her separate estate, not subject to the control or liable for the debts of the husband. Such requirements do not take away or impair any vested rights of the husband. The same doctrine was announced in *Jackson v. Jackson*. It is hardly necessary to observe that, if Mrs. Rose should be divorced from her husband, she is entitled to be restored to the possession and use of her land; or should she, in an appropriate proceeding, show herself entitled to alimony or equitable settlement, the products of her land, or the rents thereof, would be subject to the payment of it, in the same manner and to the same extent as they would be if the land belonged to the husband. This is upon the idea that the products of the land, or the rents of it, belong to him.

The only case to which the court's attention has been called which militates against the conclusion we have reached, as to the incompetency of the legislature to take from a husband his vested rights, is the

case of *Rugh v. Ottenheimer*, 6 Or. 231, 25 Am. Rep. 513. To sustain its conclusion in that case, the court cited *Maguire v. Maguire*, 7 Dana, 183. A similar question to the one involved in this case was not before the court in the *Maguire Case*; neither did the court express an opinion on a question like the one involved in this case. The part of the opinion which the Oregon court relied upon to sustain its conclusion was dictum, and that does not even sustain the conclusion of the court. The court in *Gaines v. Gaines*, 9 B. Mon. 308, 48 Am. Dec. 425, did not adhere to the doctrine which was declared in *Maguire v. Maguire*, but said: "And if it were conceded, as intimated in *Maguire v. Maguire*, supra, that the marriage contract is not, as a contract, wholly removed, like other contracts from the power of the legislature to dissolve it in any particular case by special act of divorce, and that the dissolution of a marriage, if required by the public good, may be a legislative function, still it cannot be admitted that a power thus deduced, uncertain, upon principle, as to its existence, and still more uncertain as to the grounds of its legitimate exercise, can override the express and highly conservative prohibitions in the constitution, intended for the protection of private rights of property. We are of opinion, therefore, that whatever power, to be exercised in view of the public good, the legislature may have to enact divorces in special cases, as it cannot, even for the public good, change the right of private property from one to another without compensation, much less can it do so by a special act of divorce, sought by one of the parties against the consent of the other, with the purpose or effect of operating upon the rights of property incident to the marriage relation, as created and sustained by the general laws applicable to that relation." The act of the legislature in question does not attempt to dissolve the marriage contract, nor does it give any additional grounds upon which a court might do it. So the dictum in the *Maguire Case*, to wit, "And therefore marriage, being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts," could be regarded as a correct statement of constitutional law, and still would have no application to the question at bar.

We have not felt it necessary to discuss marriage as a social relation, nor the necessity of the regulation and control of it by the sovereign power of the state. Neither have we felt it necessary to discuss the question as to the power of the legislature to prescribe the causes for which the marriage contract or relation may be dissolved. Neither would it be profitable to determine the question whether marriage is a contract *sui generis*, or one *publici juris*, or both. The marriage relation was assumed by the parties, it still exists, and no effort is made to have the court dissolve it. The questions we have been called upon to determine were: (1) What rights did the marriage give the husband in the wife's property? (2) Can the rights thus acquired be taken from the husband by the legislature and given to the wife? Our

conclusions are supported by the common law, by the consensus of judicial opinion, and by the ablest writers on constitutional law. We have thought it neither wise nor judicial to disregard the rules of law, which are the crystallization of judicial opinion. Neither do we think, because lawmakers may have been slow in giving to wives freedom in the control of their property, that we should give our sanction to a law which, if upheld, will take the property of the husband and give it to the wife. If change and transition are to take place in the domestic relationship, although right and for the public good, still it should not be done at the sacrifice of vested rights. Judgment is affirmed.*

HAZELRIGG, DU RELLE, and BURNAM, JJ., dissent.

II. Curtesy *

FOSTER v. MARSHALL.

(Superior Court of Judicature of New Hampshire, 1851. 22 N. H. 491.)

Writ of entry. The facts in this case are sufficiently stated in the opinion of the court, delivered by

BELL, J. The principal question arising in this case, is as to the effect of the statute of limitations upon the demandant's right of action. It appeared that the demanded premises were set off by a committee of partition, appointed by the court of probate, to Mary Foster, formerly Mary Eastman, the mother of the demandant, as her share of the estate of her father, Samuel Eastman, deceased, on the 14th of May, 1814. Mary Foster was then the wife of Frederick Foster, by whom she then had one or more children. Frederick Foster died in 1834, and his wife in 1836. They had six children, whose rights are said to be now vested in the plaintiff.

The defendant proved, that in 1817, one Morrill was in possession, claiming to be the owner of the demanded premises. He conveyed the

* See, also, the case of *Myers v. Hansbrough*, 202 Mo. 495, 100 S. W. 1137 (1907), holding that, while the Missouri statute creating a separate estate for married women deprives the husband of his common-law right to the possession of his wife's estate during coverture, nevertheless the statute is prospective and not retrospective, and that where the marriage occurred before the enactment of the statute, and the wife owned the land before that enactment, the husband's rights remained as they were at common law. That the husband's vested interests in general, in the property of his wife, cannot be divested by removal to another state or by subsequent legislation, see *Bush v. Garner*, 73 Ala. 162 (1882); *Tinkler v. Cox*, 68 Ill. 119 (1873); *Smith v. McAttee*, 27 Md. 420, 92 Am. Dec. 641 (1867). The law, however, of the state where the real property is situated governs the respective rights of husband and wife thereto. *Nelson v. Goree*, 34 Ala. 565 (1859); *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88 (1848); *Kneeland v. Ensley*, Meigs (Tenn.) 620, 33 Am. Dec. 168 (1838).

* For discussion of principles, see *Burdick*, Real Prop. §§ 48-52.

same by deed, dated July 3, 1817, to one Marshall, who entered and occupied, claiming title, till April 30, 1847, when he conveyed to the tenant, who has since remained in possession. The tenant claims that he has a perfect title by thirty years undisturbed and peaceable possession. The demandant alleges that his right is not barred, because at the time when the disseisin occurred, in 1817, Mrs. Foster was a feme covert, and up to 1834 her husband had an estate for life in the premises and she had no right of entry until his decease, and consequently no right of action till then, and that since that time twenty years have not elapsed.

Under the statute of limitations, which was in force in this state before the Revised Statutes, it must be considered settled, that the statute did not affect the right of a remainderman or reversioner, during the continuance of the particular estate; and that neither the acts nor the laches of the tenant of the particular estate could affect the party entitled in remainder. *Wells v. Prince*, 9 Mass. 508; *Wallingford v. Hearl*, 15 Mass. 471; *Tilson v. Thompson*, 10 Pick. (Mass.) 359.

No right of entry or action accrued to, or vested in the heirs of the wife during the continuance of an estate by the curtesy. *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390.

But the party entitled is not barred, until the usual period of limitation after the termination of the life estate. *Heath v. White*, 5 Conn. 228; *Witham v. Perkins*, 2 Greenl. (Me.) 400.

If, then, the husband had, in this case, an estate by the curtesy, or any interest in the land which would entitle his wife, who survived, to be regarded as seised only in remainder or reversion, she and her heirs would have the full period of twenty years after the death of the husband, to commence their action.

To constitute a tenancy by the curtesy, the death of the wife is one of the four things required. The estate of the husband is initiate upon the birth of issue. It is consummate on the death of the wife. 4 Kent's Comm. 29; Co. Litt. 30, a.

By the intermarriage, the husband acquires a freehold interest, during the joint lives of himself and his wife, in all such freehold property of inheritance, as she was seised of at the time of marriage, and a like interest vests in him in such as she may become seised of during the coverture. The husband acquires jointly with the wife, a seisin in fee in the wife's freehold estates of inheritance, the husband and wife being seised in fee in right of the wife. *Gilb. Ten.* 108; *Co. Litt.* 67, a.; *Palyblank v. Hawkins*, 1 Saund. 253, n.; s. c. *Doug.* 350.

This interest may be defeated by the act of the wife alone; as if, at common law, the wife is attainted of felony, the lord by escheat could enter and eject the husband. 4 Hawk. P. C. 78; *Co. Litt.* 40, a.; *Vin. Ab. Curtesy*, A; *Co. Litt.* 351, a.

After the birth of issue the husband is entitled to an estate for his own life, and in his own right, as tenant by the curtesy initiate. *Co. Litt.* 351, a. 30, a. 124, b.; *Schermerhorn v. Miller*, 2 Cow. (N. Y.) 439.

He then becomes sole tenant to the lord, and is alone entitled to do homage for the land, and to receive homage from the tenants of it, which until issue born must be done by husband and wife. 2 Black. Comm. 126; Litt. § 90; Co. Litt. 67, a. 30, a.

Then he may forfeit his estate for life by a felony, which, until issue born, he could not do, because his wife was the tenant. 2 Black. Comm. 126; Roper, Hus. & Wife, 47.

If the husband, after the birth of issue, make a feoffment in fee, and then the wife dies, the feoffee shall hold the land during the husband's life; because by the birth of issue, he was entitled to curtesy, which beneficial interest passed by the feoffment. Co. Litt. 30, a.

If such feoffment is made before issue born, the husband's right to curtesy is gone, even though the feoffment be conditional and be afterwards avoided. And if in such case the husband and wife be divorced a vinculo matrimonii, the wife may enter immediately. Guneley's Case, 8 Co. Rep. 73.

The husband's estate after issue born, will not be defeated by the attainder of the wife, for his tenancy continues, he being sole tenant. 1 Hale, P. C. 359; Co. Litt. 351, a. 40, a.; Bro. Ab. Forf. 78.

The obvious conclusion from these views of the nature of the interest of a tenant by the curtesy initiate is, that such tenant is seised of a freehold estate in his own right, and the interest of his wife is a mere reversionary interest, depending upon the life estate of the husband. The necessary result of this is, that the wife cannot be prejudiced by any neglect of the husband, and of course she may bring her action, or one may be brought by her heirs, at any time within twenty years after the decease of the husband, when his estate by the curtesy, whether initiate, or consummate, ceases, and her right of action, or that of her heirs, accrues. In this respect there is no distinction between curtesy initiate and curtesy consummate. *Melvin v. Locks & Canals*, 16 Pick. (Mass.) 140.

So far as we are aware, this principle has never been questioned, where the inheritance of the wife has been conveyed to a third person, either by the deed of the husband alone, or by a deed executed by husband and wife, which from some defect did not bind the interest of the wife. *Miller v. Shackelford*, 3 Dana (Ky.) 289; *Coller v. Motzer*, 13 Serg. & R. (Pa.) 356, 15 Am. Dec. 604; *Fagan v. Walker*, 27 N. C. 634; *McCorry v. King*, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; *Mellus v. Snowman*, 21 Me. 201; *Meramon v. Caldwell*, 8 B. Mon. (Ky.) 32, 46 Am. Dec. 537; *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *Melvin v. Locks & Canals*, 16 Pick. (Mass.) 140. But it has been held (*Melvin v. Locks & Canals*, 16 Pick. [Mass.] 161; *Kittridge v. Locks & Canals*, 17 Pick. [Mass.] 246, 28 Am. Dec. 296) that where a disseisin has been committed upon the wife's estate, the disseisin is done alike to the husband and wife; that a joint right of entry and of action accrued to both for the recovery of it, and that if such remedy is not prosecuted within twenty years, it is barred.

This is true where the husband has acquired no estate by the curtesy, and is seised merely in the right of the wife of her estate. Such are the cases of *Guion v. Anderson*, 8 Humph. (Tenn.) 298; *Mellus v. Snowman*, 21 Me. 201.

And if the husband is tenant by curtesy, as he and his wife are seised of the fee in right of the wife, the action must be brought by husband and wife, and a joint seisin in fee alleged in them in her right. *Anon. Buls.* 21. Their joint right of action is barred by the lapse of twenty years after it accrues. But it by no means follows, that the reversionary right of the wife, accruing in possession after the estate of her husband has ceased, is also barred. It is well settled, that the same party may have several and successive estates in the same property, and several rights of entry by virtue of those estates, and one of those rights may be barred without the others being affected. *Hunt v. Burn*, 2 Salk. 422; *Wells v. Prince*, 9 Mass. 508; *Stevens v. Winship*, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; *Tilson v. Thompson*, 10 Pick. (Mass.) 359.

And every reason, which can exist in favor of the right of any reversioner, applies equally in this case, namely, that a reversioner has, as such, no right of entry and no right of action during the particular estate, and consequently is not barred until twenty years after his own right of entry accrued. 2 Sugd. V. & P. 353; 3 Steph. N. P. 2920, n. 10; *Wells v. Prince*, 9 Mass. 508; *Stevens v. Winship*, 1 Pick. (Mass.) 318; *Wallingford v. Hearl*, 15 Mass. 471; *Tilson v. Thompson*, 10 Pick. (Mass.) 359; *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390, before cited. Besides, the wife by reason of her disability can make no entry to revest her estate during the coverture. Litt. p. 403; Co. Litt. 246, a. Coke says, in express terms, "after coverture, she (the wife) cannot enter without her husband."

In *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433, and *Heath v. White*, 5 Conn. 228, this question arose, and was decided in accordance with our views, and we think upon sounder principles than the cases in Massachusetts, to which we have referred.

We have compared the provisions of the Revised Statutes with the older statutes, and do not perceive, that there is, as to the point in question, any difference in their effect. Under neither would the plaintiff propose to claim any advantage from the proviso. His ground is not that the ancestor was a married woman, when her right accrued; but that her marriage and the birth of one or more children had vested a life estate in her husband, and that the disseisin was done to him, and that no right of action accrued to her in virtue of the reversionary interest, under which her heirs now claim, until she became a widow, and the husband's estate had terminated; and that the action is brought within twenty years after that event.

This appears to us a correct view of the case, and of the law; and the verdict must therefore be set aside, and a new trial granted.

III. Estates Subject to Curtesy *

BOZARTH v. LARGENT.

(Supreme Court of Illinois, 1889. 128 Ill. 95, 21 N. E. 218.)

Error to circuit court, Tazewell county; N. W. Green, Judge.

SHOPE, J. This was an action of ejectment, brought by James Bozarth, Mary L. Bozarth, and Ida B. Cook, the heirs at law of Louisa Bozarth, deceased, against William Largent, for the recovery in fee of the E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ section 17, and the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 8, all in township 23 N., range 2 W. of the third P. M., in Tazewell county. General issue was filed, and a trial had, resulting in a finding and judgment for defendant. Plaintiffs below prosecute this writ of error. The facts are as follows: Louisa Bozarth, now deceased, being the owner in fee of said lands, which she had inherited from her father, was, on August 19, 1863, married to Asa Bozarth. They lived together as husband and wife until November 1, 1868, when she died, intestate, leaving her husband, who is still living, and the plaintiffs, her children and only heirs at law, surviving her. On March 5, 1868, she and her husband executed their mortgage upon the lands in controversy, and other lands of the husband, to Anna R. Cohrs, to secure the payment of \$2,500 evidenced by the note of Asa Bozarth, the husband, payable two years after date, with 10 per cent. interest, payable annually, and containing a clause that, in default of the payment of the annual interest, the principal should become due. The mortgage was in the usual form, and contained a release of all homestead rights; and the wife acknowledged the release of all her rights of homestead, but the husband did not acknowledge the release of homestead, his acknowledgment being simply that he acknowledged the mortgage to be his free act and deed for the uses and purposes therein set forth. On March 27, 1873, Mary C. Maus, the assignee of said note and mortgage, filed her bill in the circuit court of Tazewell county against the said Asa Bozarth, and the plaintiffs and others, for the foreclosure of said mortgage. Summons was duly served on all the defendants, and a guardian ad litem was appointed for James, Ida B., and Mary Bozarth, the plaintiffs, they being then minors, who answered. At the May term, 1873, a decree was entered, foreclosing said mortgage, and finding due thereon the sum of \$2,973.75, and a solicitor's fee of \$125, provided for in the mortgage, and ordering a sale of the premises, etc. Sale was made under said decree July 12, 1873, to William Don Maus, for the sum of \$3,048.84. The sale was made en masse, the master

* For discussion of principles, see Burdick, Real Prop. § 49.

having failed to obtain bids on the several tracts when separately offered. Certificate of purchase was made and recorded the same day. At the May term, 1874, of the McLean circuit court, Albert Welch recovered a judgment against the said Asa Bozarth, John Bozarth, and Elihu Bozarth for \$1,250.50 and costs. Execution was issued to the sheriff of McLean county, and returned August 19, 1874, when Welch assigned the judgment to George W. Thompson. On the same day an alias execution issued to the sheriff of Tazewell county, which came to that officer's hands August 20, 1874, and was levied on all the land sold under the foreclosure decree, and a certificate of levy was filed and recorded August 31, 1874. On October 10, 1874, a certificate of redemption from the sale under the decree of July 12, 1873, was executed by the sheriff of Tazewell county, and recorded the same day. On October 31, 1874, the land was sold en masse by the sheriff to Welch for redemption money and costs. On January 14, 1875, after the term of office of the sheriff had expired, he made and delivered to Welch a deed for the premises, dating the same as of the day of sale. On the same day, Pratt, the then sheriff, also executed a deed to Welch for the lands on the same sale. Welch and wife, by their deed of December 1, 1875, conveyed the land to John Bozarth, and he, on May 22, 1882, conveyed the same to William Largent, defendant in error, who went into possession of the same.

At the common law a husband held in right of his wife all her lands in possession, and owned the rents and profits thereof absolutely. 1 Washb. Real Prop. 276; Tied. Real Prop. § 90; Haralson v. Bridges, 14 Ill. 37; Clapp v. Inhabitants of Stoughton, 10 Pick. (Mass.) 463; Decker v. Livingston, 15 Johns. (N. Y.) 479. The birth of issue was not necessary to this right of the husband, which continued during the joint lives of the husband and wife. It was called an estate during coverture, or the husband's freehold estate jure uxoris. Kibbie v. Williams, 58 Ill. 30; Butterfield v. Beall, 3 Ind. 203; Montgomery v. Tate, 12 Ind. 615; Croft v. Wilbar, 7 Allen (Mass.) 248. It differed from curtesy initiate, in its being a vested estate in possession, while the latter is a contingent future estate, dependent upon the birth of issue. Wright's Case, 2 Md. 429-453, 56 Am. Dec. 723. It is held in right of the wife, and was not added to or diminished when curtesy initiate arose. Subject to the husband's beneficial enjoyment during coverture, the ownership remained in the wife, and, on dissolution of the marriage, was discharged from such estate of the husband. Stew. Husb. & W. § 146. Where there was marriage, seisin of the wife, and birth of issue capable of inheriting, the husband, by the common law, took an estate in the wife's land during coverture. This was an estate of tenancy by the curtesy initiate, and which would become consummate upon the death of the wife in the life-time of the tenant. A tenant by the curtesy was seised of an estate of freehold, which was subject to alienation, and was liable to

be taken on execution for his debts. Tied. Real Prop. § 101; *Howey v. Goings*, 13 Ill. 95, 54 Am. Dec. 427; *Jacobs v. Rice*, 33 Ill. 369; *Cole v. Van Riper*, 44 Ill. 58; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Lang v. Hitchcock*, 99 Ill. 550.

The act of 1861, known as the "Married Woman's Act" provides: "That all the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman during coverture acquires in good faith from any person other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase, and profits thereof, shall, notwithstanding her marriage, be and remain during coverture, her sole and separate property, under her sole control, and be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried, and shall not be subject to the disposal, control, or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband." In this case, Louisa Bozarth, who was common source of title, was the owner of the land in controversy, as it is conceded, at the time of her marriage, August 19, 1863, to Asa Bozarth. The marriage having taken place after the act of 1861 took effect, and the wife being then the owner of the land in question, it was not, during her coverture, subject to the control, interference, or disposal of her husband, or liable for his debts or other obligations. The effect of the statute was to abrogate the husband's estate in her lands, or the estate he would have had at common law during the coverture, and consequently during that period he had no estate therein liable to execution or attachment. The act did away with the estate he would have had at common law, growing out of the mere marital relation, and of his curtesy initiate; and it therefore follows, if the wife had been living at the time of the redemption and sale by the creditor of her husband, that proceeding would not have divested any right of herself or husband, nor conferred any right upon the purchaser.

The question, however, remains whether Asa Bozarth, the husband, on the death of his wife, in 1868, acquired an estate in her land as tenant by the curtesy. We have already seen that the property of a married woman, under the act of 1861, notwithstanding her marriage, was to be and remain during coverture her sole and separate property, and was not subject to the husband's control, or liable for his debts. The general effect of statutes of this kind is to destroy the marital rights of the husband in his wife's estate; but a statute may exempt her property from his debts without in any way destroying his rights therein. Unless tenancy by the curtesy is destroyed by the statute by express words or necessary implication, or by the wife's disposition of her property by virtue of her power over it, he will be held to have an estate by the curtesy at her death. The prevailing opinion seems to be that while separate property acts do suspend

during coverture all the rights of a husband, or his creditors, in statutory separate property, they do not destroy curtesy, or prevent its vesting on her death, unless such an event is clearly excluded by the statute; as where the statute not only provides that the property of the wife shall be hers, etc., but also defines her husband's interest therein, if she dies intestate, in which case curtesy is excluded. Where she has power to alienate or charge her property, she may thereby defeat curtesy, but the statute must contain express words to enable her to convey alone; and, also, when she has power of disposition of the property by will she may thereby defeat curtesy. *Stew. Husb. & W.* §§ 161, 243; *In re Winne*, 2 *Lans. (N. Y.)* 21; *Hatfield v. Sneden*, 54 *N. Y.* 280; *Noble v. McFarland*, 51 *Ill.* 226; *Freeman v. Hartman*, 45 *Ill.* 57, 92 *Am. Dec.* 193; *Cole v. Van Riper*, *supra*.

It will be seen that the married woman's act of 1861 does not attempt to define the husband's rights in his wife's property after her decease, nor does it give her any power of disposal of her separate property, independent of the husband. The purpose and effect of the statute was to secure to the wife the control of her separate property during coverture. During that period the husband's common-law rights in her property are suspended. We are of opinion that this act did not have the effect of destroying the estate by curtesy, but that, after the passage of that act, and prior to the passage of the act of 1874, the husband, on his wife's death, leaving issue of the marriage, took a life-estate in her land as tenant by the curtesy. After the passage of the act under consideration, the estate, by the curtesy in the lands of the wife, did not vest in the husband until the death of the wife, (*Lucas v. Lucas*, 103 *Ill.* 121; *Beach v. Miller*, 51 *Ill.* 206, 2 *Am. Rep.* 290,) but upon her death such estate became consummate, and vested in the husband in all respects as at common law. *Noble v. McFarland*, 51 *Ill.* 226; *Shortall v. Hinckley*, 31 *Ill.* 219; *Gay v. Gay*, 123 *Ill.* 221, 13 *N. E.* 813; *Castner v. Walrod*, 83 *Ill.* 171, 25 *Am. Rep.* 369. It follows that we are of opinion that upon the death of the wife, in 1868, leaving issue surviving, the husband, Asa Bozarth, became seised of a freehold interest in the lands in controversy as tenant by the curtesy, and which was subject to seizure and sale on execution against him.

The validity of the sale of the premises under the decree of foreclosure, and the redemption upon the execution issued upon the judgment in favor of Welch, and against the said Asa Bozarth, and the sale thereunder, are questioned by plaintiff in error. If the foreclosure sale was void for any cause, the judgment creditor redeeming therefrom acquired no title under his purchase, for the reason that his rights, like those of the purchaser at the sale under the decree of foreclosure, are dependent upon a valid judgment or decree and sale. *Johnson v. Baker*, 38 *Ill.* 99, 87 *Am. Dec.* 293; *Mulvey v. Carpenter*, 78 *Ill.* 580; *Keeling v. Heard*, 3 *Head (Tenn.)* 592.

It is objected that there was no sufficient service of summons upon the plaintiffs in error, who were defendants in the foreclosure suit. The return to the summons therein is as follows: "Executed this writ by reading the same to the within-named Asa Bozarth, James Bozarth, Ida Bell Bozarth, and Mary Bozarth, and by delivery to each a true copy hereof, on the 10th day of April, 1872," and properly signed by the sheriff. The process was returnable to the May term, 1873. The service was in apt time. The fact that the summons was read to the defendants did no harm, and that part of the return may be disregarded. It is apparent that the circuit court had, therefore, jurisdiction of the subject-matter and of the parties, and mere errors or irregularities, if any, cannot be taken advantage of in this collateral proceeding.

It is objected that the mortgaged premises were improperly sold en masse. If this be conceded, it would not render the sale void; at most, it would only be ground for setting the sale aside on proper application to the court in apt time. It, however, appears that the land was offered by the master in separate parcels, and, receiving no bids therefor, it was then offered and sold en masse. We are not prepared to say that the action of the master was not warranted.

It is next objected that all the lands sold under the decree were redeemed en masse, and so sold to Welch under the execution. A judgment creditor's right of redemption is no greater or more extensive than that of the original debtor. He cannot redeem in a case where the original owner cannot redeem, and within the time allowed by law for redemption by the debtor. In *Hawkins v. Vineyard*, 14 Ill. 26, 56 Am. Dec. 487, a quarter section of land had been sold, of which the debtor owned only 65 acres, and it was held he could not redeem the 65 acres, but that he must redeem the whole or none. A person cannot redeem an undivided share of land by paying his proportional share of the debt; and a part owner must redeem the whole. *Durley v. Davis*, 69 Ill. 133. A purchaser of a part of mortgaged land cannot redeem that part by paying his proportion of the debt. *Meacham v. Steele*, 93 Ill. 135. When the purchaser at a master's sale of an entire tract of land afterwards assigns an undivided interest in such purchase, there can be no legal redemption of such undivided interest by a judgment creditor. *Groves v. Maghee*, 72 Ill. 526; *Titsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577.

Section 25, c. 77, Rev. St., provides: "Any person entitled to redeem may redeem the whole or any part of the premises sold in like distinct parcels or quantities in which the same were sold." If the several mortgaged tracts had been sold separately, redemption might have been made of any one or more of the tracts. In such case the amount that each tract sold for would furnish the basis for determining the amount to be paid in order to redeem; but, as the several parcels of land were sold together, and for a gross sum, neither the

debtor nor his judgment creditor could redeem without paying the full amount for which the same sold, with interest. The law gives the debtor 12 months in which to redeem, after which time any judgment creditor of the debtor may also redeem within 15 months from the date of the sale; but, in so doing, the creditor will possess no greater right than his debtor had within the time limited for redemption by him. After the expiration of 12 months from the sale, the right of redemption of the judgment debtor is gone. He no longer has any interest in the premises, and cannot take advantage of mere irregularities in making redemption by his judgment creditor, and his acquisition of title by virtue of a sale in pursuance of such redemption. The purchaser at the foreclosure sale makes no objection to the validity of the redemption, and, having accepted the money, the redemption was complete. The title of Asa Bozarth being gone by his failure to redeem within the time allowed by law, he was not injured by a sale en masse on the execution, if, indeed, the sale could have been otherwise made.

There is no force in the objection that the redemption should have been made in the name of Thompson, assignee of Welch, the judgment creditor. *Swezey v. Chandler*, 11 Ill. 445. It in no way concerns the plaintiffs in error whether redemption was made in the name of the plaintiff in the judgment against Asa Bozarth or in the name of his assignee. No proof was made or offered at the trial tending to show that the premises, when sold under the decree of foreclosure, or when the mortgage was given, were occupied by the mortgagors, or either of them, as a homestead; nor does it appear that they were at any time so occupied. Therefore, the question of the right of homestead was not presented for adjudication, and cannot now be considered in this court. It may, however, be observed that the mortgage was executed and acknowledged before the act of 1872, relating to conveyances, took effect, and the cases cited by counsel were determined under the provisions of that act.

It is claimed that only the title of Louisa Bozarth passed by the sale under the decree of foreclosure, and therefore a creditor of her husband could not redeem from that sale. This contention is not well grounded. While the husband, as we have seen, at the time of the execution of the mortgage had no estate in the land, it was necessary to the execution of a valid mortgage or conveyance of his wife's estate therein that he should join in the mortgage or conveyance, which he did. The mortgage was in the usual form, and contained covenants of both the husband and wife of good right to convey, seisin in fee, and of general warranty, and was sufficient to pass not only the estate of the wife, but also all the estate, right, and interest of the husband in the property, which he then had, or might subsequently acquire. If he had no estate by the curtesy initiate or otherwise during the life of the wife, upon her death, he took an

estate for life in this land as tenant by the curtesy, which, under the covenants of the mortgage, inured to the benefit of the mortgagor, *Gochenour v. Mowry*, 33 Ill. 331. The sheriff's deed was dated October 31, 1874, the date of the sale upon the redemption, but was, in fact, executed January 14, 1875, after the term of office of the sheriff had expired. Section 21 of the act relating to judgments, etc., provides that the redeeming judgment creditor shall be considered as having bid at the sale the amount of the redemption money paid by him, with interest thereon, and the costs of the redemption and sale; "and, if no greater amount is bid at such sale, the premises shall be struck off to such person making such redemption, and the officers shall forthwith execute a deed of the premises to him, and no other redemption shall be allowed." It is urged that the provision of the statute requiring the deed to be made "forthwith" is mandatory, and that a failure in this respect would render the sale void. We are not prepared to so hold. The purchaser is entitled to a deed forthwith in such case, but the failure of the sheriff to make the deed immediately after the sale will not render the redemption and sale invalid. This provision of the statute must be regarded as directory only.

It is lastly objected that Reeves, the sheriff, had no authority to make the deed after his term of office had expired. Section 30 of the act relating to judgments, etc., provides: "The deed shall be executed by the sheriff, master in chancery, or other officer who made such sale, or by his successor in office, etc." Freeman, in his work on Execution, (section 327.) says: "The officer who made the sale, whether he continues in office or not, is, in ordinary circumstances, and in the absence of statutory provisions to the contrary, the proper person to make the conveyance. * * * When the term of the officer who made the sale terminates, his power to make the conveyance continues. In fact, unless the new sheriff is specially authorized by statute, he seems to have no authority whatever to make a conveyance based on a sale made by his predecessor."

We are of opinion that the deed made by the retiring sheriff, under our statute, was valid. If this is so, it will be unnecessary to determine whether the deed made by his successor in office is good or not. In any event, under the section of the statute quoted, by one deed or the other, the title acquired under the redemption sale passed to the grantee in said deeds. The plaintiffs claimed an estate in fee in the land in controversy, with a present right of possession. Their father having a life-estate in the property, which has passed by virtue of the foreclosure sale, the redemption and sale thereunder, and the deeds in pursuance thereof to the defendant, they are not entitled to recover of the defendant the possession of said lands during the continuance of such estate. Until the termination of that life-estate by the death of the life-tenant, their right to a recovery must be postponed.

Some questions are raised as to the effect of the proceedings before mentioned upon the fee to the land, which is not now before us for consideration, and no adjudication is made in respect thereof. The judgment of the circuit court will be affirmed.*

I. Equitable Estates

McTIGUE v. McTIGUE.

(Supreme Court of Missouri, Division No. 1, 1893. 116 Mo. 136, 22 S. W. 501.)

Appeal from St. Louis circuit court; D. D. Fisher, Judge.

Ejectment by Mamie McTigue, by her next friend, James Halloran, against John McTigue. Judgment for plaintiff. Defendant appeals. Affirmed.

BRACE, J. This is an action in ejectment to recover possession of a lot in the city of St. Louis, in which the plaintiff had judgment, and the defendant appeals.

Both parties claim title under Hannah McTigue, deceased; the plaintiff being the only child and heir of the said Hannah, who died intestate; and the defendant the surviving husband of the said Hannah, and the father of the plaintiff. The title of the said Hannah was acquired by the following deed: "This deed, made and entered into this 12th day of January, 1876, by and between Adolphus Meier, (widower,) of the city of St. Louis, state of Missouri, party of the first part, and James Halloran, of the same place, party of the second part, and Hannah McTigue, wife of John McTigue, party of the third part, witnesseth: That the said party of the first part, in consideration of the sum of seven hundred dollars to him in hand paid by said party of the third part, the receipt of which is hereby acknowledged, and the further sum of one dollar to him paid by the said party of the second part, the receipt of which is hereby also acknowledged, do by these presents, grant, bargain, and sell unto the said party of the second part the following described lot or parcel of ground being and laying in the county of St. Louis, state of Missouri, to wit: Lot numbered fourteen, in block No. 7, Adolphus Mei-

* Although, under the Illinois statute, in the foregoing case, it was held that the estate of curtesy initiate is not abolished, it is generally held, however, that the effect of the married women's acts is to abolish curtesy initiate in the property of the wife acquired after the passage of such statutes. See *Luntz v. Greve*, 102 Ind. 173, 26 N. E. 128 (1885); *Hill v. Chambers*, 30 Mich. 422 (1874); *Hill v. Nash*, 73 Miss. 849, 19 South. 707 (1896); *Williams v. Casualty Co.*, 150 N. C. 597, 64 S. E. 510 (1909). Under the Missouri statute, however, it is held that the husband is not deprived of his curtesy initiate, the effect of the statute being only to take away the husband's right to possession and usufruct during the wife's life. *Donovan v. Griffith*, 215 Mo. 149, 114 S. W. 621, 20 L. R. A. (N. S.) 825, 128 Am. St. Rep. 458, 15 Ann. Cas. 724 (1908).

er's First addition to the city of St. Louis, a plat of which is on file in the office of the recorder of deeds for St. Louis county, said lot having a front on the south line of Cozens street of twenty-five feet, by a depth of one hundred and twenty-three feet, to an alley of fifteen feet wide; to have and to hold the same, with all the rights, privileges, and appurtenances thereto belonging or in any wise appertaining, unto him, the said party of the second part, his heirs and assigns forever; in trust, however, to and for the sole and separate use, benefit, and behoof of the said Hannah McTigue. And the said James Halloran, party of the second part, hereby covenants and agrees to and with the said Hannah McTigue that he will suffer and permit her, without let or molestation, to have, hold, use, occupy, and enjoy the aforesaid premises, with all the rents, issues, profits, and proceeds arising therefrom, whether from sale or lease, for her own sole use and benefit, separate and apart from her said husband, and wholly free from his control and interference, debts, and liabilities, curtesy, and all other interests whatsoever, and that he will at any time and all times hereafter, at the request and direction of said Hannah McTigue, expressed in writing, signed by her or by her authority, bargain, sell, mortgage, convey, lease, rent, convey by deed of trust for any purpose, or otherwise dispose of said premises, or any part thereof, to do which full power is hereby given, and will pay over the rents, issues, profits, and proceeds thereof to her, the said Hannah McTigue, and that he will, at the death of said Hannah McTigue, convey or dispose of the said premises, or such part thereof as may then be held by him under this deed, and all profits and proceeds thereof, in such manner, to such person or persons, and at such time or times, as the said Hannah McTigue shall by her last will and testament, or any other writing signed by her, or by her authority, direct or appoint; and the said Hannah McTigue shall have power at any time hereafter, whenever she shall from any cause deem it necessary or expedient, by any instrument in writing under her hand and seal and by her acknowledged, to nominate and appoint a trustee or trustees in the place and stead of the party of the second part above named, which trustee or trustees, or the survivors of them, or the heirs of such survivors, shall hold the said real estate upon the same trust as above recited; and upon the nomination and appointment of such new trustees the estate in trust hereby vested in said party of the second part shall thereby be fully transferred and vested in the trustee or trustees so appointed by the said Hannah McTigue. And the said Adolphus Meier hereby covenants to warrant and defend the title to the said real estate against the lawful claims of all persons whomsoever, except all taxes, special or general, for the year 1876; and the said party of the second part covenants faithfully to perform and fulfill the trust herein created. In testimony whereof the

said parties have hereunto set their hands and seals the day and year first above written."

The plaintiff, who is a minor suing by her next friend, the said James Halloran, trustee in said deed, claims the right to the possession of the premises as the only child and heir at law of her mother. The defendant is in possession, and has been ever since the death of his wife, and claims as tenant by the curtesy.

There can be no doubt that by the terms of the deed an equitable estate of inheritance was vested in the said Hannah, which, upon her death intestate, descended to the plaintiff as her only heir at law, and that such estate was her separate equitable estate. It is also well-settled law in this state that the husband is entitled to curtesy in the equitable estate of the wife of which she died seised, although such estate was limited to her separate use. *Alexander v. Warrance*, 17 Mo. 228; *Baker v. Nall*, 59 Mo. 265; *Tremmel v. Kleiboldt*, 75 Mo. 255; *Id.*, 6 Mo. App. 549; *Soltan v. Soltan*, 93 Mo. 307, 6 S. W. 95; *Spencer v. O'Neill*, 100 Mo. 49, 12 S. W. 1054. Such seems to be the law generally in this country, except in those states where the estate of curtesy has been abolished by statute. *Tied. Real Prop.* (2d Ed.) § 105. And while "it is not competent at common law, in the grant to a woman of an estate of inheritance, to exclude her husband from his right of curtesy, a like rule does not prevail in equity, where an estate may be so limited as to give the wife the inheritance, and deprive the husband of curtesy, if the intent of the devisor or settlor be express." 1 Washb. *Real Prop.* (5th Ed.) p. 176, § 15; 4 *Amer. & Eng. Enc. Law*, p. 965, note 3.

As such was the evident intention expressed in the foregoing deed, the defendant's curtesy was barred, and the judgment of the circuit court so holding is affirmed. All concur, except BARCLAY, J., absent.*

* Accord: *Woodward v. Woodward*, 148 Mo. 247, 49 S. W. 1001 (1899); *Donovan v. Griffith*, 215 Mo. 149, 114 S. W. 621, 20 L. R. A. (N. S.) 825, 128 Am. St. Rep. 458, 15 Ann. Cas. 724 (1908). When no provision is made otherwise on the death of the wife, the husband will have curtesy in estates conveyed to her by deed, or devised to her, for her sole and separate use. *Rank v. Rank*, 120 Pa. 191, 13 Atl. 827 (1888); *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775 (1909).

IV. Dower †

1. NATURE AND ORIGIN

CRENSHAW v. MOORE.

(Supreme Court of Tennessee, 1911. 124 Tenn. 528, 137 S. W. 924, 34 L. R. A. [N. S.] 1161, Ann. Cas. 1913A, 165.)

Appeal from Circuit Court, Shelby County: J. P. Young, Judge.

Action by Thomas B. Crenshaw and others against Charlotte Blood Moore and others. Decree for defendants, and plaintiffs appeal. Affirmed.

LANDSEN, J. William R. Moore died in Shelby county testate, and his widow, Mrs. Charlotte Blood Moore, dissented from his will. Such proceedings were had in the county court of Shelby county that she was assigned a year's support, to the value of \$20,000, and dower of one-third of his real estate. The complainant brought this suit to collect from her an inheritance or succession tax on both her year's support and dower, under the act of 1893 (Shannon's Code, § 724), as amended by chapter 479 of the Acts of 1909.

The act of 1893 imposed a tax upon "all estates, real, personal, and mixed, of every kind whatsoever, situated within this state, whether the person or persons dying seised thereof be domiciled within or out of this state, passing from any person who may die seised or possessed of such estates, either by will or under the intestate laws of this state, or any part of such estate or estates, or interest therein, transferred by deed, grant, bargain, gift, or sale, made in contemplation of death, or intended to take effect in possession or enjoyment after the death of the grantor or bargainor," passing to collateral kindred of the owner; and section 20, c. 479, Acts of 1909, provided "that inheritances not taxed under the present laws shall pay a tax as follows: All inheritances of \$5,000 and over, but less than \$20,000, a tax of one per centum of their value. All inheritances of \$20,000 and over, a tax of one and one-fourth per centum of their value, to be collected by the county court clerk of each county."

This is a privilege tax imposed on the right of acquiring property by succession. *State v. Alston*, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178; *Knox v. Emerson*, 131 S. W. 972. Likewise it is a special tax, and the rule is that laws imposing such taxes are to be construed strictly against the government, and favorably to the taxpayer. *English v. Crenshaw*, 120 Tenn. 531, 110 S. W. 210, 17 L. R. A. (N. S.) 753, 127 Am. St. Rep. 1025.

† For discussion of principles, see *Burdick*, Real Prop. §§ 53-60.

The widow's year's support is given her by statutory provision, which is found in sections 4020 and 4021 of Shannon's Code. It is inconceivable that the Legislature intended to levy the tax in question upon this bounty of the widow, given her by the law out of her husband's personal estate. She does not succeed to the husband's title to the property set apart to her as a year's support, but acquires it adversely to his administrator by virtue of the statute. By the act of separation of the personalty assigned to her by the commissioners, and the subsequent confirmation of their report by the court, the title to the specific property thus set apart becomes absolutely vested in the widow. The obvious intention of the Legislature in passing this statute was to provide a temporary support for her and her family immediately on the death of her husband. It is an extension by law of her right of support out of the personal estate of her husband for one year after his death, and is founded in a sound public policy, which has for its purpose a conservation of the family upon the death of the husband. The widow does not succeed to the right of the husband, nor does she take the property under the intestate laws of this state. It is a special provision made for her in the law for the support of herself and her family. *Bayless v. Bayless*, 4 Cold. 363; *Railway Co. v. Kennedy*, 90 Tenn. 185, 16 S. W. 113.

Nor do we think that the widow's dower is subject to this tax. By the common law, if a husband acquire an estate which is subject to descend to his heirs, the wife, at the same time the husband acquires his title, has vested in her the right of dower; and although the husband aliened the estate, the wife's dower would attach. By the acts of 1784 and 1823, carried into Shannon's Code at section 4139, the widow is dowable in one-third part of all the lands of which her husband died seised and possessed, or of which he was equitable owner. In all other respects, the widow's right of dower in this state is the same as it was at common law. It has the same qualities as the common-law right of dower, but its quantity was cut down by the statutes referred to. This right originates with the marriage. It is an incumbrance upon the title of the heir at law, and is superior to the claims of the husband's creditors. Its origin is so ancient that neither Coke nor Blackstone can trace it, and it is as "widespread as the Christian religion and enters into the contract of marriage among all Christians."

"By a fiction of law, the estate in dower relates to the marriage. It is adjudged in *Fulwood's Case*, 4 Co. 65, that the widow shall hold her dower discharged from all judgments, leases, mortgages, or other incumbrances made by her husband after the marriage, because her title, being consummated by his death, has relation to the time of the marriage, and, of course, is prior to all other titles. She claims by and through her husband, has the oldest title, is under him for the valuable consideration of marriage, the best respected in the law,

and cannot be disturbed by any other claiming under the husband." *Combs v. Young*, 4 Yerg. 226, 26 Am. Dec. 225.

The preamble to the act of 1784, which was the first passed in this state reducing the quantity of the widow's dower estate, recites, in substance, that the dower allotted by law in lands for widows, in the then unimproved state of the country, was a very inadequate provision for the support of such widows; that it was only just and reasonable that those who, by their prudence, economy, and industry had contributed to raise up an estate to their husbands, should be entitled to share in it—thus showing that the Legislature recognized that the widow's dower under this act had the same origin and was of the same quality as her dower existing at common law.

So, it is seen that, whether it be considered that the widow holds her dower in the nature of a purchaser from her husband by virtue of the marriage contract, or whether it be merely a provision of the law made for her benefit, it cannot be considered that her right is in succession to that of her husband upon his death, or that the husband bestows it upon her in contemplation of death. While it is true that her right to dower is not consummated until the death of the husband, and that it is carved out of only such realty as he owned at his death, it does not follow from this premise that the widow succeeds to his title by the intestate laws. She derives it by virtue of the marriage, and in her right as wife to be consummated in severalty to her upon the death of her husband. *Boyer v. Boyer*, 1 Cold. 14.

The Supreme Court of Illinois, in *Billings v. People*, 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807, upon a construction of the inheritance tax law of that state, together with the laws governing the descent and distribution of the property of persons dying intestate, reached a different conclusion from that reached by us. The reasoning of that court is predicated chiefly upon a construction of the statutes of that state, which are essentially different from those of this state. It is stated, however, that, while the husband cannot deprive his wife of her inchoate right of dower, the state may, and that she does not hold by contract, but holds by laws which the state may change. Without undertaking to meet all of the arguments set forth in support of this very able opinion, we are content to hold that, under a proper construction of the statute in question, the Legislature did not intend to tax the widow's dower as an inheritance from the estate of her husband, or a succession to his rights therein. As stated heretofore, she does not inherit from her husband, but derives her right by virtue of her marriage, which is consummated upon her husband's death, and becomes an incumbrance upon the inheritance of the heirs at law, and is, to that extent, an interest adverse to the inheritance from the husband. For the same reason she does not succeed to the rights of the husband. Her dower is intended for her support and maintenance, and an intention to tax it will not be imputed to the Legisla-

ture, except where the language employed makes it plainly imperative to do so.

Billings v. People, supra, is the only case cited by counsel which discusses the question at issue in any way, and no case is cited discussing the liability of the widow's year's support for the tax involved here. But, upon reason, we are content to hold that neither the year's support nor dower is subject to the tax. It results that the decree of the court below is affirmed, with costs.

V. Estates Subject to Dower *

CUMMINGS v. CUMMINGS.

(Court of Chancery of New Jersey, 1910. 76 N. J. Eq. 568, 75 Atl. 210.)

Partition by Thomas Cummings and others against John Cummings and others. Decree advised for defendants.

WALKER, V. C. This is a suit for partition in which the property has been sold and the proceeds remain to be distributed. The question before the court is whether the defendant Mary Cummings, widow of Christopher Cummings, is entitled to dower in the estate in the lands which descended to her husband upon the death of his father. Patrick Cummings, the ancestor, died intestate, seised of the property sold, leaving Bridget Cummings his widow and certain children and heirs at law, among whom was Christopher Cummings. He joined the other children in executing a quitclaim deed to their mother, the widow, by which they released and quitclaimed unto her the lands in question during the term of her natural life. The habendum clause of the deed reads as follows: "To have and to hold the said premises as before described, with the appurtenances, unto the said party of the second part, to the sole and only proper use, benefit and behoof of the said party of the second part, for and during her natural life, but after her death the same to revert to the grantors, their heirs and assigns forever." After joining in the deed mentioned, Christopher Cummings married the defendant Mary Cummings and died in the lifetime of his mother, who has since died. The mother and son both died before the filing of the bill.

By our act relative to dower (Gen. St. 1895, p. 1275, § 1), it is provided: "That the widow whether alien or not, of any person dying intestate, or otherwise, shall be endowed, for the term of her natural life, of the one full and equal third part of all lands, tenements and other real estate, whereof her husband, or any other to his use, was seised of an estate of inheritance, at any time during the

* For discussion of principles, see Burdick, Real Prop. § 54.

coverture, to which she shall not have relinquished or released her right of dower, by deed executed and acknowledged in the manner prescribed by law for that purpose."

The question is: Was Christopher Cummings seised of an estate of inheritance in the lands mentioned during the lifetime of his mother, notwithstanding the quitclaim deed to her in which he joined. Upon the death of his father he became seised of an equal undivided one-fourth interest and estate of inheritance in fee in the premises, and it must now be decided whether he divested himself of that inheritance by executing the quitclaim deed. If so, that estate was outstanding in his mother at and during the time of his marriage and at the time of his death. The deed bargains, sells, remises, releases, and quitclaims the lands to the grantee, the mother, during the term of her natural life only. The habendum is as above set out. There are no words of inheritance in the deed.

Notwithstanding Christopher's execution of the quitclaim deed, I think he was at all times after the death of his father until his own death seised of a remainder in fee, which is an estate of inheritance, in the lands, and, consequently, was so seised when he married the defendant Mary Cummings after the execution of that deed. The life estate which passed to the grantee in the quitclaim deed did not convey a fee for want of words of inheritance. Consequently the fee and the inheritance remained in the grantors. See *Kearney v. Maccomb*, 16 N. J. Eq. 189; *Trusdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391; *Melick v. Pidcock*, 44 N. J. Eq. 525, 15 Atl. 3, 6 Am. St. Rep. 901; *Chancellor v. Bell*, 45 N. J. Eq. 538, 17 Atl. 684. A deed to one for life does not grant an estate in fee. *Adams v. Ross*, 30 N. J. Law, 505, 82 Am. Dec. 237. "Fee" originally signified the right of the tenant to the use of the land held of a superior, but this meaning passed into the modern signification of an estate of inheritance. 2 Bl. Com. 106. "Inheritance" is defined to be a perpetuity in lands to a man and his heirs, and the property which is inherited is called the "inheritance." Bouv. Law Dict. (Rawle's Revision) p. 1037. An "estate for life" is a "freehold estate" not of inheritance. Id. 692. All freehold estates are estates of inheritance, except estates for life. Id. 693. An estate for life created by deed is not an estate of inheritance. Am. & Eng. Ency. of Law (2d Ed.) vol. 11, p. 377.

The estate which the widow acquired by the conveyance from the heirs was an estate for life, and was less than an estate of inheritance.

In my opinion Christopher Cummings was seised in fee of an estate of inheritance at all times during the coverture, and I will advise that his widow is entitled to dower in that estate.

VI. Quarantine *

McKAIG v. McKAIG.

(Court of Chancery of New Jersey, 1892. 50 N. J. Eq. 325, 25 Atl. 181.)

Bill for partition by William H. McKaig and wife against Charles P. McKaig and others.

PITNEY, V. C. The bill is by a brother against brothers and sisters, asking for partition of land which descended to them from their father, George McKaig, deceased. There is no dispute as to the shares in which the land is held, and it clearly appeared at the hearing that it could not be divided without great prejudice, and so there must be a sale. The bill alleges that Charles P. McKaig, one of the defendants, had been in the exclusive possession, and had enjoyed the rents and profits, of the premises from the death of the father, which occurred in February, 1879, up to the spring of 1888, a period of nine years, and had during that time cut and carried away therefrom, for his own use, a quantity of wood and timber; that such possession by Charles was had by virtue of an agreement or understanding with the other heirs that he should pay an annual rent of \$150 therefor, and that the widow of George McKaig was entitled, as dowress, to one third of the rents and profits; and it prays that an account may be taken of such rents and profits, and Charles be decreed to pay two thirds of the same, or that the same may be deducted from his share of the proceeds of the sale of the land. Charles McKaig only has answered, and he denies that he occupied the premises under any agreement or understanding with his brothers and sisters, but alleges, in substance, that he entered and kept possession as the tenant of the widow, who was entitled to such possession and to the rents and profits until her dower was assigned to her, which was never done.

The serious and important question in the case is whether the widow of George McKaig, who died seised, was entitled to the exclusive possession and use of the premises in question under the second section of the dower act, (Revision, p. 320,) which enacts that, "until such dower be assigned to her, it shall be lawful for the widow to remain in and hold and enjoy the mansion of her husband, and the messuage or plantation thereto belonging, without being liable to pay any rent for the same." The facts are as follows: The widow, Sarah McKaig, owned in her own right a farm, upon which was a dwelling and the ordinary outbuildings, and in and upon which she resided with her husband for many years before and at the time of his death. This was their only home and mansion. Immediately ad-

* For discussion of principles, see Burdick, Real Prop. § 55.

joining this farm of the wife—the dividing line running near the buildings—were situate the lands in question, belonging to the husband. They comprised plow, meadow, and wood land, the proportion of plow land being small, and containing 148 acres in three parcels of 98, 33, and 17 acres, respectively, of which, however, only the larger one adjoined the wife's farm. The husband worked and used these lands in common with his wife's lands, making no distinction. There was no dwelling or other buildings upon them.

The question is, was the widow entitled to quarantine in them? I can find no judicial expression or decision on the point. The industry of counsel was unable to cite any. Nevertheless, I think the question reasonably free from doubt. There is here no "mansion house of the husband," and without it I am unable to perceive how there can be any statutory quarantine. It is the messuage or plantation belonging "thereto,"—that is, to the mansion house of the husband,—of which the widow is given the exclusive right until her dower is assigned. The statute does not give her such right in the messuage and plantation of her husband belonging to and used with her own mansion. The words "belonging to," as here used, clearly indicate uniformity of title, as well as contiguity of location and community of use. The right given by this enactment is greater than that enjoyed at the common law. It is not a declaration of what the law was, but a decided change in it; and, while our courts have manifested a disposition to construe this section favorably towards the widow, I can find in such disposition no warrant for changing what seems to me to be the plain meaning of the language used. I think the widow was not entitled to the exclusive use of these lands, and hence that the son, who was in possession, must account for two thirds of the rents and profits.

With regard to the amount of the rents and profits, the proof shows that the defendant Charles moved into the mansion house with his mother immediately after his father's death. His mother was far advanced in years, and infirm, and was, besides, at the time quite ill from some temporary disorder, from which, however, she so far recovered as to live eight or nine years. The complainant and his brothers and sisters other than Charles understood and supposed, and there was evidence tending to show, that Charles entered under an agreement and understanding that he was to pay rent at the rate of \$150 per year for the whole farm, including both the part belonging to his mother and that belonging to his father, and that the same should be applied to the support of his mother during her life; in other words, that he was to support his mother for the use of both farms, and his brothers and sisters supposed that this was the arrangement until after their mother's death, when, to their surprise, Charles made a claim against her estate for a large sum (\$1,314) for her support and maintenance from her husband's death, and this claim,

after litigation in the orphans' court, was sustained, and Charles received payment therefor without any allowance for the use of either farm. This result could only have been arrived at on the ground that the arrangement and understanding upon which the other heirs supposed that Charles was occupying these premises had no legal existence, and the heirs are therefore free to demand an account of the rents and profits in this suit.

Much evidence was given as to the annual value of the land here involved. It would be profitless to discuss it. The amount involved is trifling, and I will simply state the result at which I have arrived. I find the value of the use of the land here in question to be \$36 a year over and above taxes, and the defendant must account for two thirds of that sum, or \$24 a year for nine years, making \$216. The wood cut by him I find to be worth \$25. He should pay interest on these sums from April 1, 1888. The defendants did not set up the statute of limitations. I think the defendants, other than the complainant, though they have not answered or filed cross bills, are entitled to the benefit of this adjudication, although, strictly speaking, made only upon complainant's prayer. The practice in partition cases does not require that each party should assert his rights by a separate pleading. To require them to do so would greatly increase the cost of the proceedings.

VII. Incidents of Dower ¹⁰

See Higgins Oil & Fuel Co. v. Snow, ante, p. 10.

VIII. Dower—How Barred ¹¹

1. DIVORCE

VAN CLEAF v. BURNS.¹²

(Court of Appeals of New York, Second Division, 1890. 118 N. Y. 549, 23 N. E. 881, 16 Am. St. Rep. 782.)

Appeal from supreme court, general term, second department, affirming a judgment entered upon the decision of the court at special term.

The plaintiff brought this action to recover dower in certain lands situate in the city of Brooklyn, of which one David Van Cleaf, deceas-

¹⁰ For discussion of principles, see Burdick, Real Prop. § 58.

¹¹ For discussion of principles, see Burdick, Real Prop. § 59.

¹² Reversing 43 Hun, 461.

ed, was seised while he was her husband. She alleged in her complaint that she was married to said Van Cleaf on the 6th of July, 1875, and that he died November 12, 1884; that during said period he was seised and possessed of the premises in question, and that the defendants are in possession thereof, claiming to own the same. Without denying any of said allegations, the defendant Catherine Burns answered, alleging that on the 9th of April, 1881, said David Van Cleaf, who was then a resident of the state of Illinois, was duly divorced from the plaintiff, on account of her misconduct, by the judgment of a court in that state which had jurisdiction of the subject-matter and of the parties.

The trial court found the following facts: "That in an action in the circuit court of Cook county, Ill., in which David Van Cleaf was plaintiff, and said Mary B. Van Cleaf was defendant, brought for a divorce and dissolution of the marriage for the cause and ground that said Mary B. Van Cleaf had willfully deserted and absented herself from said David Van Cleaf, her husband, without any reasonable cause, for the space of more than two years before the commencement of such action, which by the laws of Illinois was a ground for absolute divorce and dissolution of the bond of marriage, such proceedings were had that on April 9, 1881, judgment was granted and perfected therein in favor of said David Van Cleaf against said Mary B. Van Cleaf, dissolving the bond of marriage between them for the cause and ground aforesaid, which cause and ground was by said judgment adjudged to exist. That said court, in pronouncing said judgment, had jurisdiction of the subject-matter of the action and judgment, and of the parties thereto. That said David Van Cleaf was at the time of said action and judgment domiciled in Chicago, in the state of Illinois; and said Mary B. Van Cleaf, on October 18, 1880, appeared in said action in person, and filed her answer in writing to the complaint, having first received notice of the commencement of the suit by the service on her in this state of the summons and complaint. That the plaintiff was during all the time above mentioned a resident of the city of Brooklyn, in the state of New York." The court found, as a conclusion of law, that the complaint should be dismissed upon the merits, with costs, to which the plaintiff duly excepted.

The only proof given by either party on the trial was a stipulation admitting the facts as found. The case states that no other facts appeared; and the parties stipulate, for the purpose of any appeal, that David Van Cleaf was seised in fee-simple of the premises in question between the date of his marriage to the plaintiff and the date of said divorce, and that such admission shall have the same effect as though found by the trial judge upon proper evidence.

VANN, J., (after stating the facts as above.) Our Revised Statutes provide that "a widow shall be endowed of the third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage," (1 Rev. St. p. 740, § 1;) but that, "in case of divorce dissolving the marriage contract for the misconduct

of the wife, she shall not be endowed," (Id. p. 741, § 8.) It is further provided by the Code of Civil Procedure that, where final judgment is rendered dissolving the marriage in an action brought by the wife, her inchoate right of dower in any real property of which her husband then was, or was theretofore, seised, shall not be affected by the judgment; but that, when the action is brought by the husband, the wife shall not be entitled to dower in any of his real property, or to a distributive share in his personal property. Sections 1759, 1760. These provisions of the Code replaced a section of the Revised Statutes which provided that "a wife, being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate, or any part thereof, nor to any distributive share of his personal estate." 3 Rev. St. (6th Ed.) p. 157, § 61, repealed Laws 1880, c. 245, § 1, subd. 4. An absolute divorce could be granted only on account of adultery, either under the Revised Statutes or the Code. 3 Rev. St. (6th Ed.) p. 155, §§ 38-42; Code Civil Proc. §§ 1756, 1761. According to either, an action could be brought to annul, to dissolve, or to partially suspend the operation of the marriage contract. A marriage may be annulled for causes existing before or at the time it was entered into; and the decree, in such cases, destroys the conjugal relation ab initio, and operates as a sentence of nullity. Id. §§ 1742, 1754.

A marriage contract may be dissolved, and an absolute divorce, or a divorce proper, granted for the single cause already mentioned. Such a judgment operates from the date of the decree by relieving the parties from the obligations of the marriage, although the party adjudged to be guilty is forbidden to remarry until the death of the other. It has no retroactive effect, except as expressly provided by statute. *Wait v. Wait*, 4 N. Y. 95. An action for a separation, which is sometimes called a "limited divorce," neither annuls nor dissolves the marriage contract, but simply separates the parties from bed and board, either permanently or for a limited time. Code Civil Proc. §§ 1762-1767. Neither the nature nor effect of the judgment of divorce granted by the court in Illinois in favor of David Van Cleaf against the plaintiff appears in the record before us, except that the bond of marriage between them is stated to have been dissolved upon the ground that she had willfully deserted and absented herself from her husband, without reasonable cause, for the space of more than two years prior to the commencement of the action. It does not even appear that the decree would have the effect upon her right to dower in the state where it was rendered that is claimed for it here. Apparently, it simply dissolved the marriage relation; and whether it had any effect, by retroaction, upon property rights existing at its date, is not disclosed. A judgment of a sister state can have no greater effect here than belongs to it in the state where it was rendered. *Suydam v. Barber*, 18 N. Y. 468, 75 Am. Dec. 254. There is no presumption that the statutes of the

state of Illinois agree with our own in relation to this subject. *Cutler v. Wright*, 22 N. Y. 472; *McCulloch v. Norwood*, 58 N. Y. 562. If they do, the fact should have been proved, as our courts will not take judicial notice of the statutes of another state. *Hosford v. Nichols*, 1 Paige, 220; *Chanoine v. Fowler*, 3 Wend. 173; *Sheldon v. Hopkins*, 7 Wend. 435; *Whart. Ev.* §§ 288, 300. Adequate force can be given to the Illinois judgment, by recognizing its effect upon the status of the parties thereto, without giving it the effect contended for by the respondent. *Barrett v. Failing*, 111 U. S. 523, 4 Sup. Ct. 598, 28 L. Ed. 505; *Mansfield v. McIntyre*, 10 Ohio, 27.

The judgment appealed from, therefore, can be affirmed only upon the ground that a decree dissolving the marriage tie, rendered in another state, for a cause not regarded as adequate by our law, has the same effect upon dower rights in this state as if it had been rendered by our own courts adjudging the party proceeded against guilty of adultery. This would involve, as a result, that the expression, "misconduct of the wife," as used in the Revised Statutes, means any misconduct, however trifling, that by the law of any state is a ground for divorce. Thus it might happen that a wife who resided in this state, and lived in strict obedience to its laws, might be deprived of her right to dower in lands in this state by a foreign judgment of divorce, based upon an act that was not a violation of any law of the state of her residence. It is important, therefore, to determine whether the provision that a wife shall not be endowed in case of divorce dissolving the marriage contract for her misconduct refers only to that act which is misconduct authorizing a divorce in this state, or to any act which may be termed "misconduct," and converted into a cause of divorce by the legislature of any state. In *Schiffer v. Pruden*, 64 N. Y. 47, 49, this court, referring to said provision of the Revised Statutes, said that "the misconduct there spoken of must be her adultery; for there is no other cause for a divorce dissolving the marriage contract." It had before said, in *Pitts v. Pitts*, 52 N. Y. 593, that "a wife can only be barred of dower by a conviction of adultery in an action for divorce, and by the judgment of the court in such action." While these remarks were not essential to the decision of the cases then under consideration, they suggest the real meaning and proper application of the word "misconduct," as used in the Revised Statutes, with reference to its effect upon dower. When the legislature said, in the chapter relating to dower, that a wife should not be endowed when divorced for her own misconduct; and, in the chapter relating to divorce, that she should not be entitled to dower when convicted of adultery,—the sole ground for a divorce,—we think that, by misconduct, adultery only was meant, or that kind of misconduct which our laws recognize as sufficient to authorize a divorce. The sections relating to dower, and to the effect of divorce upon dower, are in *pari materia*, and should be construed together; and, when thus construed, they lead to the result already indicated. *Beebe v. Estabrook*, 79 N. Y. 246, 252.

The repeal of section 48, which provided that the wife, if convicted of adultery, should not be entitled to dower, has not changed the result, as sections 1759 and 1760 of the Code have been substituted, leaving the law unchanged. They enact, in effect, that, when judgment is rendered at the suit of the husband dissolving the marriage for the adultery of the wife, she shall not be entitled to dower in any of his real property. There is no change in meaning; and the slight change in language, as the commissioners of revision reported, was to consolidate and harmonize the new statute with the existing system of procedure. Throop, Anno. Code, § 1760, note. The repealed section was pronounced in the Ensign Case, 103 N. Y. 284, 8 N. E. 544, 57 Am. Rep. 717, "an unnecessary and superfluous provision as respects dower." It was also held in that case that while the relation of husband and wife, both actual and legal, is utterly destroyed by a judgment of divorce so that no future rights can thereafter arise from it, still existing rights, already vested, are not thereby forfeited, and are taken away only by special enactment as a punishment for wrong. It follows that depriving a woman of her right to dower is a punishment for a wrongful act perpetrated by her. Is it probable that the legislature intended to punish as a wrong that which it had not declared to be wrong? If a divorce granted in another state for willful desertion relates back so as to affect, by way of punishment, property rights previously acquired, must not a divorce for incompatibility of temper, or any other frivolous reason, be attended with the same result? Does the penalty inflicted upon the guilty party to a divorce granted in this state for a single and special reason attach to any judgment for divorce, granted in any state, for any cause whatever, including, as is said to be the law in one state, the mere discretion of the court?

~~Our conclusion is that as nothing except adultery is, in this state, regarded as misconduct with reference to the subject of absolute divorce, no other misconduct is here permitted to deprive a wife of dower, even if it is the basis of a judgment of divorce lawfully rendered in another state, unless it expressly appears that such judgment has that effect in the jurisdiction where it was rendered, and as to that we express no opinion. The judgment should be reversed, and a new trial granted, with costs to abide event. All concur, except FOLLETT, C. J., dissenting.~~

2. LOSS OF HUSBAND'S SEISIN (JUDICIAL SALE)

BUTLER v. FITZGERALD.

(Supreme Court of Nebraska, 1895. 43 Neb. 192, 61 N. W. 640, 27 L. R. A. 252, 47 Am. St. Rep. 741.)

Appeal from district court, Lancaster county; Tibbets, Judge.

Action by Lydia Butler against John Fitzgerald and others to recover dower in land. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

RAGAN, C.¹³ It appears, from a stipulation of the parties to this suit in the record, that the material facts in this case are: That Lydia Butler and David Butler were husband and wife, and resided, as such, in this state from the year 1866 until David Butler's death, in May, 1891, and that Lydia Butler still resides in this state; that on the 6th of October, 1879, David Butler was the owner in fee simple of certain real estate, which on said day was levied upon by an execution issued on a judgment obtained against David Butler alone, and sold to satisfy such judgment; that John Fitzgerald became the purchaser of said real estate at said execution sale, and said sale was followed by a judicial confirmation and conveyance to him of said real estate. Lydia Butler brought this suit to the district court of Lancaster county against John Fitzgerald and others, to recover her dower in said real estate, which had been sold and conveyed under execution as aforesaid. She had judgment, and John Fitzgerald and others interested in said real estate have appealed. The stipulation of facts referred to, and on which the case was tried in the court below, provides that, if the court shall find that Lydia Butler was entitled to dower in said real estate, the court shall ascertain the value of such dower interest, and render judgment therefor in her favor; that said Lydia Butler agrees to accept a gross sum of money in lieu of said dower.

The two important questions presented by this appeal are:

1. Does the sale of the real estate of a husband under execution, on a judgment against him alone,—followed by judicial confirmation and conveyance,—extinguish the dower interest of the widow of said husband in said real estate? Blackstone defines "dower" at common law thus: "'Tenant in dower' is where the husband of a woman is seised of an estate of inheritance and dies. In this case the wife shall have a third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold for herself for the term of her natural life." And he further says that the object of the common law in giving a widow dower in the estate of her husband was "to provide for the sustenance of the widow, and for the nurture

¹³ Part of the opinion is omitted.

and education of the younger children." Bl. Comm. bk. 2, pp. 128, 129. Section 1, c. 23, p. 401, Comp. St. 1893, provides: "The widow of every deceased person shall be entitled to dower or the use, during her natural life, of one-third part of all the lands whereof her husband was seised, of all (an) estate of inheritance at any time during the marriage unless she is lawfully barred thereof." It will be seen that our statute in the matter of a widow's dower follows the rule of the common law, or, more properly speaking, the statute is but declaratory of the common law. In *Scribner on Dower* (volume 2, p. 2, § 2) it is said: "It will be observed that this estate [dower] arises solely by operation of law, and not by force of any contract, expressed or implied, between the parties. It is the silent effect of the relation entered into by them, not as in itself incidental to that relation or as implied by the marriage contract, but merely as that contract calls into operation the positive institutions of the law." And it was expressly held in *Shearer v. Ranger*, 22 Pick. (Mass.) 447, that "an inchoate right of dower is an existing incumbrance on land, within the meaning of the covenant against incumbrances." However this may be, it is clear that, "when lawful marriage of a man and woman and the ownership of real estate by the former concur, an inchoate dower right attaches, in the nature of a charge or incumbrance upon the real estate of the husband."

Under certain conditions, unnecessary to notice here, the dower right may never attach; but when it has once attached it remains and continues a charge or incumbrance upon the real estate, unless released by the voluntary act of the wife or extinguished by operation of law, and is consummate upon the death of the husband, and in certain other contingencies not involved in this case, provided for by section 23 of chapter 25 of the Compiled Statutes, entitled "Divorce and Alimony." In this case none of the conditions existed which prevented the inchoate dower right of Lydia Butler from attaching to the real estate of her husband owned by him at the time of his marriage to her, or acquired by him thereafter. The husband is dead; and we now proceed to inquire whether his widow, within the meaning of section 1, c. 23, quoted above, has been or is "lawfully barred" of a dower interest in the real estate in controversy. The rule of the common law as to the effect of a husband's acts during the coverture, on the dower interest of his wife in his real estate, is thus stated by *Scribner on Dower* (volume 1, p. 603, § 1): "After the right of dower has once attached, it is not in the power of the husband alone to defeat it by any act in the nature of an alienation or charge. It is a right attaching in law, which, although it may never become absolute,—as if the wife died in the lifetime of the husband,—yet, from the moment that the facts of marriage and seisin concur, it is so fixed on the land as to become a title paramount to that of any person claiming under the husband by subsequent act. The alienation of the husband, therefore, whether voluntary, as by deed or will, or

involuntary, as by bankruptcy or otherwise, will confer no title on the alienee as against the wife in respect of her dower, but she will be entitled to recover against such alienee in the same manner as she would have recovered against the heir of the husband had the latter died seised."

In the case at bar the real estate in controversy was not "aliened" by the husband, as that phrase is ordinarily understood. He was deprived of the title to this real estate involuntarily, and we may presume that the only act of his which led to his being deprived of his real estate by the law was his voluntarily contracting the debt made the basis of the judgment under which the real estate was sold. The decisions of the courts of last resort of the states in construing statutes like our own, and the decisions of the courts of last resort of the states whose statutes do not define dower, but follow the common-law rule, sustain the proposition quoted above from Scribner, as to the inability of a husband, by any voluntary act of his, to bar his wife's right of dower to his real estate after such right has once attached, either directly or indirectly.

In *Pifer v. Ward*, 8 Blackf. (Ind.) 251, it was held that "if a mechanic's lien accrue after the employer's marriage, and the employer die, after the accruing of the lien, the right of dower of the employer's widow will be paramount to the lien." And in *Bishop v. Boyle*, 9 Ind. 169, 68 Am. Dec. 615, it was held that "the widow's right of dower extends to and includes a house erected on land of her husband, and her claim is superior to a mechanic's lien for which the property was sold under a decree against the husband to enforce the lien." The court said: "The wife's dower is a favorite of the law, not resting in contract or resulting from the marriage relation. Hers is the elder lien. The mechanic bestows his labor with a knowledge of her prior right to the real estate, and he knows that the house he is building, as brick is added to brick and nail after nail is driven, becomes real estate. He may protect himself by security, or not venture. She is passive, and can do nothing. It is for this reason that she is declared to be a favorite of the law." See, also *Mark v. Murphy*, 76 Ind. 534.

In *Schaeffer v. Weed*, 3 Gilman (Ill.) 511, it was held that "a widow's dower cannot be affected by the lien created by the statute for the benefit of mechanics," etc., "but she is entitled to dower of all the real estate of which her husband was seised during coverture, unless she had released it in the form prescribed by law." In *Gove v. Cather*, 23 Ill. 634, 76 Am. Dec. 711, it was held: "The enforcement of a mechanic's lien for improvements, made by the husband in his lifetime, will not cut off his wife's right of dower, even to the extent of the value of such improvements." See, also, *Dingman v. Dingman*, 39 Ohio St. 172.

In *Grady v. McCorkle*, 57 Mo. 172, 17 Am. Rep. 676, William Grady owned certain lands, and agreed with his son Leonard that, if

the latter would go on the lands and improve them, he would convey the same to him by way of advancement, and charge him with their value. Leonard took possession of the lands, and made improvements on them, and occupied the lands until his death. William Grady died not having conveyed the lands to Leonard. The widow and heirs of Leonard Grady brought a suit against the widow and heirs of William Grady for specific performance of William Grady's contract, and the court decreed a specific performance of the contract. The widow of William Grady was a party to this suit, and served with process, but made no appearance. After this the widow of William Grady brought suit for her dower interest in the lands, and the court held: "The alienation of real estate by the husband, whether voluntary, as by deed or will, or involuntary, as by proceedings against him or otherwise, will confer no title on the alienee, as against the wife, in respect to her dower;" and that the suit for specific performance of the contract made by the widow's husband, and the decree enforcing such contract, did not bar the widow's dower rights, as they were not drawn in question in the specific performance suit; that the decree in that case had the same effect, and no more, than a deed would have had executed by William Grady alone at the time the decree was rendered, had he then been living.

Section 3, c. 46, Gen. St. Minn. 1878, provides that a surviving husband or wife shall be entitled to and shall hold in fee simple an undivided one-third of all lands of which the deceased was at any time during the marriage seised or possessed. A wife owned certain real estate. A judgment was obtained against the wife, and her lands levied upon and sold to satisfy the judgment. The wife then died, and the husband brought suit against the purchasers of the real estate at the execution sale to recover his rights in said real estate; and in *Dayton v. Corser*, 51 Minn. 406, 53 N. W. 717, 18 L. R. A. 80, the supreme court of Minnesota held that "the inchoate contingent interest of a husband or wife in real estate owned by the other, fixed [by the statute just quoted], and commonly called the 'dower right,' is not divested by a transfer of title from the owner of the property to a purchaser at an execution sale founded upon a judgment against such owner." The court said: "It hardly seems necessary to cite authorities to the proposition that at common law a wife could not be deprived of her dower rights in the real estate of her husband through a sale upon execution on a judgment obtained against him subsequently to the marriage." See, also, *Barker v. Parker*, 17 Mass. 564.

It is to be remembered that the language of our statute is that the widow shall have dower in all the real estate of which her husband was seised during the marriage, "unless she is lawfully barred thereof." Keeping in view the nature of a dower interest as defined by the common law, and the reason and spirit of the common law on the subject, and the authorities just cited, we would feel safe in saying that the dower rights of the appellee in this case were not extinguished or

barred by the sale on execution of her husband's real estate during his life, on a judgment rendered against him. But our statute has not remitted the courts for guidance entirely to the common law, and common-law decisions in respect of dower, for determining in what manner a wife or widow may be lawfully barred of her dower rights. Sections 12, 13, 15, c. 23, Comp. St. 1893, provide in what manner a married woman may bar her dower rights in the real estate of her husband. Substantially, these provisions provide that a married woman shall be deemed to have released or waived her rights to dower in her husband's real estate only by her voluntary act or contract. And section 43, c. 73, Comp. St. 1893, provides that a married woman, "to convey her right of dower she must execute a deed with or without her husband." And section 7 of said chapter 23 provides that "when a widow shall be entitled to dower out of any lands which shall have been aliened by the husband in his lifetime * * * that such lands shall be estimated in setting out the widow's dower according to their value at the time when they were so aliened." This statute is of itself a legislative recognition of the inability of a husband to deprive his wife of her dower rights in his real estate by a direct or indirect alienation thereof; and section 477 of the Code of Civil Procedure provides that judgments shall be a lien upon the lands of a debtor; and section 491a of the Code provides that, when an execution shall be levied upon real estate, the sheriff shall cause the interest of the execution debtor in such real estate to be appraised at its real value; and by sections 499 and 500 of the Code it is provided, in substance, that the sale of a debtor's real estate on execution, and the conveyance of such real estate to the purchaser thereof at such sale, shall vest in such purchaser the interest which the execution debtor had in said real estate at the time the judgment under which it was sold became a lien thereon.

In the case at bar, David Butler had the title to the real estate in controversy at and before the time it was sold on execution, but that title was incumbered or burdened with the inchoate dower interest of his wife, the appellee; and when the judgment was rendered against David Butler it became a lien upon the interest of David Butler in said real estate, but that lien was subject to the inchoate dower interest of the wife therein. When this real estate was sold, and the sale confirmed, and the sheriff executed a deed in pursuance thereof, he conveyed to Fitzgerald all the interest that David Butler had in this real estate; and such purchaser took the title to this real estate charged with the same burdens and incumbrances thereon that it was charged with while the title rested in David Butler,—the wife's inchoate dower right. The rule of caveat emptor applies to a purchaser of real estate at a judicial sale thereof on execution; and the conveyance made to such a purchaser by the sheriff has no greater effect and conveys no greater estate than would a quitclaim deed for the premises executed by the execution debtor. *Norton v. Trust Co.*, 35 Neb. 466,

53 N. W. 481, 18 L. R. A. 88, 37 Am. St. Rep. 441; Id., 40 Neb. 394, 58 N. W. 953; *Hamilton v. Mining Co.* (C. C.) 33 Fed. 562. What the law does not permit a husband to do directly he may not do by indirection; and, as we have seen it was not in the power of David Butler, by voluntarily alienating his real estate during his marriage, to deprive his wife of her dower rights therein, it logically follows that the sale of David Butler's real estate on execution, on a judgment rendered against him alone, did not bar or extinguish the dower right of his wife or widow therein; and it is immaterial whether the debt on which such judgment was rendered was contracted voluntarily or otherwise by the husband. We accordingly hold and decide that the sale of the real estate of a husband under execution on a judgment against him alone, followed by judicial confirmation and conveyance, does not extinguish the inchoate dower of the wife in such real estate, and that upon the death of the husband the widow is entitled to have her dower assigned out of such real estate. * * *

3. RELEASE BY WIFE

HINCHLIFFE v. SHEA.

(Court of Appeals of New York, 1886. 103 N. Y. 153, 8 N. E. 477.)

Appeal from judgment of general term of the supreme court, Second department, affirming judgment of Kings county special term.

A mortgage by Shea, his wife joining, was of a date subsequent to the recovery of a judgment against him by a third person; and the sheriff, proceeding upon a writ of execution regularly issued, levied upon the mortgaged premises, and sold them, and, there being no redemption, executed his deed to one Anne Horgan, she being the highest bidder. Shea afterwards died, and consequently his wife's inchoate right of dower became a vested one. Anne Horgan thereafter conveyed her interest to the widow. Afterwards, by the present suit, the widow's dower was sought to be subjected to the payment of the mortgage debt. Plaintiff had judgment below, and defendant appealed.

ANDREWS, J. The joinder by a married woman with her husband in a deed or mortgage of his lands does not operate as to her by way of passing an estate, but inures simply as a release, to the grantee of the husband, of her future contingent right of dower in the granted or mortgaged premises, in aid of the title or interest conveyed by his deed or mortgage. Her release attends the title derived from the husband, and concludes her from afterwards claiming dower in the premises, as against the grantee or mortgagee, so long as there remains a subsisting title or interest created by his conveyance. But

it is the generally recognized doctrine that when the husband's deed is avoided, or ceases to operate, as when it is set aside at the instance of creditors, or is defeated by a sale on execution under a prior judgment, the wife is restored to her original situation, and may, after the death of her husband, recover dower as though she had never joined in the conveyance. *Robinson v. Bates*, 3 Metc. (Mass.) 40; *Malloney v. Horan*, 49 N. Y. 111, 10 Am. Rep. 335; *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63; *Littlefield v. Crocker*, 30 Me. 192.

In short, the law regards the act of the wife in joining in the deed or mortgage not as an alienation of an estate, but as a renunciation of her inchoate right of dower in favor of the grantee or mortgagee of her husband in and of the title or interest created by his conveyance. It follows, therefore, that her act in joining in the conveyance becomes a nullity whenever the title or interest to which the renunciation is incident is itself defeated. *Scrib. Dower*, c. 12, § 49. The wife's deed or mortgage of her husband's lands, cannot stand independently of the deed of her husband, when not executed in aid thereof, nor can she by joining with her husband in a deed of lands to a stranger, in which she has a contingent right of dower, but in which the husband has no present interest, bar her contingent right. *Marvin v. Smith*, 46 N. Y. 571.

These principles are, we think, decisive of this case. The plaintiff's mortgagee has been defeated by the paramount title derived under the execution sale. It was the husband's mortgage, and not the mortgage of the wife, except for the limited and special purpose indicated. The lien of the mortgage, as a charge on the lands of the husband has, by the execution sale, been subverted and destroyed; nor can the security be converted into a mortgage of the widow's dower, now consummate by the death of her husband. This would be a perversion of its original purpose. Her act in signing the mortgage became a nullity on the extinguishment of the lien on the husband's lands. If on the execution sale there had been a surplus applicable to the mortgage, it might very well be held that the widow could not be endowed therein, except after the mortgage had been satisfied. The surplus would represent in part the mortgaged premises. See *Elmendorf v. Lockwood*, 57 N. Y. 322.

We think the authorities require a reversal of the judgment. Judgment reversed, and complaint dismissed, with costs. All concur, except MILLER, J., absent.

4. WIDOW'S ELECTION

WARREN v. WARREN.

(Supreme Court of Illinois, 1893. 148 Ill. 641, 36 N. E. 611.)¹⁴

Appeal from circuit court, Winnebago county; John D. Crabtree, Judge.

Bill by Eliza A. Warren against John H. Warren, individually, and as executor of the last will and testament of Alpha Warren, deceased, Edward S. Warren, Harriet N. Warren, and Roy Warren. There was a decree granting complainant only part of the relief prayed for, and she appeals. Reversed.

MAGRUDER, J.,¹⁵ (after stating the facts.) The first question arising upon the assignments of error is whether or not the appellant is entitled to have dower assigned to her in the lands of her deceased husband. Sections 10 and 11 of the present dower act, which was approved on March 4, 1874, and went into force on July 1, 1874, are as follows:

(10) "Any devise of land, or estate therein, or any other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the dower of such survivor in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower in the lands and to one-third of the personal estate after the payment of all debts."

(11) "Any one entitled to an election under either of the two preceding sections shall be deemed to have elected to take such jointure, devise or other provision, unless, within one year after letters testamentary of administration are issued, he or she shall deliver or transmit to the county court of the proper county a written renunciation of such jointure, devise or other provision."

Section 13 prescribes the form of renunciation, by the terms of which the surviving husband or wife does thereby "renounce and quitclaim all claim to the benefit of any * * * devise or other provision made to me by the last will and testament of the said * * * and I do elect to take in lieu thereof my dower and legal share in the estate of the said * * *."

As the appellant did not renounce the provisions of the will within one year after letters testamentary were issued to the executor of Alpha Warren's estate, it would seem to be clear that she had elected to take under the will, and that she is not entitled to an assignment

¹⁴ Rehearing denied.

¹⁵ The statement of facts and part of the opinion is omitted.

of dower in the testator's lands under the decisions of this court. *Cowdrey v. Hitchcock*, 103 Ill. 262; *Stunz v. Stunz*, 131 Ill. 210, 23 N. E. 407; *Cribben v. Cribben*, 136 Ill. 609, 27 N. E. 70.

It is contended by counsel for appellant that the acceptance by the widow of the provision made for her in the will will not bar her dower, unless such provisions shall be a reasonably adequate compensation for the loss of what she would have been entitled to under the statute if there had been no will. This contention is based upon the decision of the circuit court of the United States for the seventh circuit in the case of *U. S. v. Duncan*, 4 McLean, 99, Fed. Cas. No. 15,002, where a liberal construction was given to sections 39 and 40 of the act of this state in regard to wills in force in 1829, (Rev. Laws 1833, p. 624.) But a comparison of sections 39 and 40 of the act of 1829 with sections 10 and 11 of the act of 1874 will show that the phraseology of the former is different from the phraseology of the latter. By the terms of said section 11, if the surviving husband or wife fails to renounce within the year, he or she shall be deemed to have elected to take the provision given by the will. The directions of the statute are explicit, and a compliance with them can work no harm to any of the parties concerned. Section 10 directs that the devise or other provision made by the will shall be a bar to dower "unless otherwise expressed in the will." If, therefore, a husband desires to make, in his will, a provision for his wife, which shall not operate as a bar to her dower, he can therein state that such provision is not to be in lieu of dower, in which case she will take both her dower and what is devised or bequeathed to her. If the widow deems such devise or bequest an inadequate compensation for dower, she can file her renunciation within the time specified, and thereby take what she is entitled to under the statute.

In the present case, however, we are not satisfied that the provision made for the appellant by the will is not a reasonably adequate compensation for her dower, if the doctrine of the *Duncan Case* should be held to be applicable. It is conceded that the personal estate of the deceased testator has been exhausted in the payment of the debts and expenses of administration, and that no personal property would have passed to appellant if her husband had died intestate. All that she could have received in any event was dower in the lands. All that her dower, when assigned and set off would amount to, would be the right to use the one-third in value of her husband's lands, and draw the rents and profits thereof, during her life. The will, by directing that one-third of the annual rents and interest, after deducting certain expenditures, shall belong to her, gives her what is substantially equivalent to the value of her dower in the real estate.

Counsel refer us to a number of cases which hold that the wife cannot be deprived of her dower by a testamentary disposition in her favor, so as to put her to her election, unless the testator has de-

clared the same to be in lieu of dower, either in express words or by necessary implication. Under the rule laid down in most of these cases, the testator will not be presumed to have intended the provision in his will to be a substitute for dower, unless the claim of dower would be inconsistent with the will, or so repugnant to its provisions as to disturb and defeat them. *Adsit v. Adsit*, 2 Johns. Ch. (N. Y.) 448, 7 Am. Dec. 539; *Smith v. Kniskern*, 4 Johns. Ch. (N. Y.) 9; *Wood v. Wood*, 5 Paige, 595; *Fuller v. Yates*, 8 Paige (N. Y.) 325; *Church v. Bull*, 2 Denio (N. Y.) 430, 43 Am. Dec. 754. The decisions referred to will be found, upon examination, to have been rendered in the absence of such statutory provisions as exist in this state, and such decisions are consequently inapplicable to the case at bar. The great object in construing the wills which the courts there had under consideration, was to ascertain the intention of the testator upon the question whether or not the testamentary disposition was to be taken in lieu of dower. Even in the *Duncan Case*, *supra*, the reasoning of the court proceeds largely upon the ground that the testator will not be presumed to have intended his bequest or devise to be a substitute for dower if its amount or value is, to a very considerable extent, less than the amount or value of the dower. But, under the peculiar terms of the Illinois statute, the provision in the will is declared to be a bar, unless the intention that it shall not be a bar is expressed in the will. The statute makes the silence of the testator the conclusive index to his intention, and it also makes the failure to renounce within a specified time conclusive evidence that the surviving husband or wife has elected to take under the will.

We think, however, that if the rules laid down in the authorities relied upon are applied to the interpretation of the will in this case, there will be disclosed an intention to make the testamentary provisions a substitute for dower, and not a gift in addition to it. Alpha Warren drew his own will, and he therein designates the portion of the "annual rents and interest" given to his wife as "one-third of income belonging to her as dower." If the one-third of the income specified in the will was to be her dower or "dowery," he could not have intended that she should have another dower outside of and in addition to that given by the will. Again, after directing that one-third of his net annual income shall belong to his wife, he directs that the other two-thirds thereof shall belong to his son, John H. Warren. If the wife was to have dower besides the third of the income given her by the will, the son could not take the two-thirds of the income therein devised to him. The widow, in such case, would virtually have two-thirds, and only one-third would be left for the son. It follows that the claim of dower on the part of the widow is inconsistent with the provisions made for the son in the will, and so repugnant to them that, if allowed, it would defeat them. A case might arise where the widow, in accepting the testamentary disposition, acted

without full knowledge and understanding of her true situation and rights, and of the consequence of her acceptance. 4 Kent, Comm. p. 58. It might then be necessary to determine whether the lapse of more than a year without renunciation would cut her off from the privilege of making her election. *U. S. v. Duncan*, supra; *Cowdrey v. Hitchcock*, supra. But here it appears that the widow was correctly advised as to her testamentary rights and her statutory rights and the value of the one as compared with the other.

Counsel further insists, that the dower of the appellant is not barred because the devise is not to the wife, but to the executor in trust for her benefit. Under the English statute of uses a jointure was not available to bar the widow's dower, unless the settlement was to the wife herself, and not to any other person in trust for her. *Van Arsdale v. Van Arsdale*, 26 N. J. Law, 404. It has also been held that a devise of lands to trustees for the benefit of the wife does not necessarily indicate intention to defeat dower, as the trustee may take the lands subject to its legal incidents, that of dower included. *Wood v. Wood*, supra; *Church v. Bull*, supra. But the language of our statute is broad enough to include devises to trustees for the benefit of the wife, as well as those directly to the wife herself. It would be a narrow construction that would exclude a devise to a trustee from the meaning of the following words in section 10: "Any other provision made by the will of a deceased husband or wife for a surviving wife or husband." The use of the word "for" forbids a limitation of the meaning to devises made to the wife. * * *

HOMESTEADS

I. Who Entitled to Homestead¹

SHEEHY v. SCOTT.

(Supreme Court of Iowa, 1905. 128 Iowa, 551, 104 N. W. 1139, 4 L. R. A. [N. S.] 365.)

Appeal from District Court, Muscatine County; James W. Bollinger, Judge.

Mary A. Scott, a widow, died intestate May 13, 1903, seised of the following real estate: Lot 9 in block 71, in the city of Muscatine; also lot 8 and the east half of lot 9 in block 106, and lot 8 in block 107. Ten children survived her, one of whom, George E. Scott, was indebted to the plaintiff on a promissory note of \$1,500, dated February 14, 1898, with interest at 6 per cent. per annum on which this action was begun June 2, 1903, aided by writ of attachment, which was levied on Scott's interest in the above real estate June 20, 1903. He answered by admitting the indebtedness and alleging that lot 9 in block 71 was the homestead of deceased and for that reason exempt from the levy. John F. De Camp intervened, and in his petition alleged the purchase of the east half of lot 9 and lot 8 from Mary A. Scott January 3, 1903; that George E. Scott had conveyed his interest therein to him, and he had taken possession, all prior to the levy, which he prayed to have vacated. The reply put in issue the allegations of the answer and petition of intervention. On hearing judgment was entered against George E. Scott as prayed. Lot 9 in block 71 was adjudged to be exempt as the homestead of deceased. Emma De Camp was substituted as intervener, and her petition dismissed, and the property other than the homestead ordered to be sold and the proceeds applied on the judgment. The plaintiff and intervener both appeal; that of the former being first perfected. Affirmed.

LADD, J.² The husband of Mary A. Scott died in 1898. From that time until April, 1903, she operated the Scott House, a hotel in Muscatine. In April, 1902, she purchased lot 9 in block 71, but did not move into the house thereon until April 7, 1903. Shortly afterwards she was taken sick, and died May 13th of the same year. The contention of the plaintiff is that this lot was not her homestead at the time of her death, and therefore the interest of George E. Scott, one of her ten surviving children, therein should be subjected to the lien of her judgment. Our statute provides that the homestead is exempt from the precedent debts of the heirs of the owner. All of Mary A.

¹ For discussion of principles, see *Burdick, Real Prop.* § 63.

² Part of the opinion is omitted.

Scott's children had attained their majority. One son, Frank E. Scott, and a daughter, Mrs. Fahey, and the latter's daughter, had been living in the house with her for over a month, when she died. It was her home, and the controversy is whether her relations with these children were such that she and they, or either of them, constituted a family; for in this state the exemption of the homestead is to the family. A single person is not a family, and therefore cannot claim a homestead, unless continuing in possession as surviving spouse. *Fullerton v. Sherrill*, 114 Iowa, 511, 87 N. W. 419; *Emerson v. Leonard*, 96 Iowa, 311, 65 N. W. 153, 59 Am. St. Rep. 372. "Family" has been defined as a collective body of persons who live in one house under one head or manager. *Tyson v. Reynolds*, 52 Iowa, 431, 3 N. W. 469; *Parsons v. Livingston*, 11 Iowa, 104, 77 Am. Dec. 135. But this is not accurate, for strangers might thus band themselves together and live under the direction of a leader. To constitute one or more persons, with another, living together in the same house, a family, it must appear that they are being supported by that other in whole or in part, and are dependent on him therefor, and, further, that he is under a natural or moral obligation to render such support. *Fox v. Ralston*, 126 Iowa, 481, 102 N. W. 424.

Does the evidence indicate that such a relation existed between Mrs. Scott and those who lived with her? The record has convinced us that Frank E. Scott, though over 40 years old, was dependent on the deceased for his support. He had been married, but was divorced. He was lazy, addicted to the excessive use of intoxicating liquors and morphine, and was reputed a gambler. He had kept a butcher shop, but, upon his father's death in 1898, returned to the Scott House, where he lived until his mother's removal to the premises in controversy. For several years one Weaver had charge of the hotel office, and Frank did chores about the hotel. After Weaver left he took charge of the office, kept the books, and received money, but one Kline was allowed part of his board for sleeping in the office and caring for him when disabled by the use of alcohol or morphine. That during this time his mother supplied him with money is doubtless true, and he may have construed that received as wages. Indeed, he testified that she had paid him "different prices at different times—about \$10 a week and my board"; that "mother always paid all of her children wages; that mother paid me wages up to her death, and I know she paid my sister Mrs. Fahey every Saturday night." Nowhere does he undertake to state that any agreement was had as to what he was to receive, or what was in fact paid or when; and, aside from his designation of what she gave him as wages, his testimony is not inconsistent with the thought that she merely gave him enough to supply his wants, which may have been more or less than wages. During the six weeks prior to his mother's death, he did nothing but chores about the house, and since then he had continued in that occupation for his board with his sister. Of course, he always has been intending to leave, but,

through the persuasion of mother and sister, remained "until he got ready to settle." He admits that he threatened the defendant that he would "swear to a lie," rather than allow him to succeed, and this, with his appearance on the stand, doubtless led the district court to reject the story of having been merely an employé of his mother, and adopt the more reasonable conclusion, deducible from the record, that, through excesses, he had become practically incapable of caring for himself, and was being maintained by his mother, because of the natural obligation to her child. The relation of Mrs. Fahey was not shown to have been that of a dependent, though she lived with her. But the two were enough to, and did, constitute a family, within the meaning of the law. *Fox v. Ralston*, supra, and cases cited.

Rulings on objections to questions propounded to different witnesses, and also the taxation of costs, are assigned as errors, but not argued, and for this reason not decided. The proof, independent of such evidence, however, was sufficient to show that deceased, who was 79 years of age, was occupying the premises as her home; and as she, with her dependent son, constituted a family, the court rightly decided that the property was exempt as a homestead. * * *

II. How Acquired ⁴

INGELS v. INGELS.

(Supreme Court of Kansas, 1893. 50 Kan. 755, 32 Pac. 387.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by Lemuel Ingels against Milliard F. Ingels and Eliza Ingels. There was judgment for plaintiff, and defendants bring error. Affirmed.

ALLEN, J. On the 22d day of June, 1889, defendant in error obtained a judgment in the district court of Atchison county, Kan., against T. J. Ingels and M. F. Ingels for the sum of \$906.90 and costs of suit. On the 9th day of August, 1889, execution was issued on said judgment to the sheriff of Atchison county. On the 19th of

³ In North Dakota it has been recently held that a divorced husband, deprived of the custody of the children, is not the head of a family. *Holcomb v. Holcomb*, 18 N. D. 561, 120 N. W. 547, 21 Ann. Cas. 1145 (1909). In Mississippi, it is held, however, that a widower whose minor children are absent at school in another state may claim a homestead. *Roberts v. Thomas*, 94 Miss. 219, 48 South. 408, 136 Am. St. Rep. 573 (1908). Under some of the statutes, persons other than heads of families may have the exemption privilege of a homestead. See *Holm v. Pauly*, 11 Cal. App. 724, 106 Pac. 266 (1909); *McLaughlin v. Collins*, 75 N. H. 557, 78 Atl. 623 (1910).

⁴ For discussion of principles, see *Burdick*, Real Prop. § 64.

August, 1889, said sheriff levied the same on lot 11, and the west 40 feet of lot 12, block 11, in that part of the city of Atchison commonly known as "West Atchison." The sheriff duly advertised this property for sale, and on the 26th day of September, 1889, sold the same to the plaintiff below for the sum of \$157. Motions were thereafter filed both to confirm and set aside said sale. These motions were heard at the same time. The motion to set aside the sale was overruled, and the motion to confirm was sustained. The defendants below excepted to the ruling of the court on these motions, and bring the case here for review.

Two points are urged by counsel for the plaintiffs in error. One is that the appraisement is defective, because the appraisement fails to state that the appraisers made an estimate of the real value of the property. The appraisement does state that the appraisers, being first duly sworn impartially to appraise the said property upon actual view, had truly and impartially appraised said property, and that the particular property in controversy was appraised at \$150. We think this a substantial compliance with the statute. It is not necessary that the precise language of the statute be used in the report of the appraisers. We think that the appraisement in this case fairly shows that the property was appraised at what the appraisers deemed its real value. This is a substantial compliance with the requirement of the statute.

The principal question presented for our consideration is whether or not this property was a homestead, and therefore exempt from levy and sale. The facts with reference to the matter, as appears from the record, are as follows: The plaintiffs in error formerly owned and occupied a homestead in West Atchison, which they sold in the year 1887, expecting and intending at the time to reinvest the proceeds in another homestead. Soon thereafter they invested a part of the proceeds of this sale in the property in controversy, for the purpose and with the intention of making it their permanent homestead. At the time of the purchase there was no house or other building thereon, and the same was not inclosed. They inclosed the lots with a fence, and, as fast as they were able, proceeded to and had hauled on said lots materials, stone, lumber, etc., with which to build a dwelling house and building to occupy as a homestead. Milliard F. Ingels then took a contract at Valley Falls to bore for coal, and temporarily moved to Valley Falls, to be near his work, and intending to return to his homestead, complete his dwelling house, and occupy the same as his permanent homestead. While he was still engaged on his contract at Valley Falls, and before he had completed the same, on the 19th day of August, 1889, the sheriff levied said execution on said property, and sold the same as before stated. The plaintiffs in error have no other homestead, and no other real estate of which to make a homestead. After the levy the defendants below built a house on said lots, which they occupied at the time of the sale. The defendants never occupied the

premises in question from the time they were purchased by the defendants, in March, 1887, till after the making of the levy thereon; and at the time said judgment was rendered and at the time the levy was made, the said premises were vacant and unoccupied, excepting that they were inclosed by an old fence.

The facts in this case are to be gathered from the affidavit made by both plaintiffs in error, and also from an agreed statement of the facts made by both parties, and included in the record. The statements with reference to the placing of building materials on the lots are contained in the affidavit. From the agreed statement it appears that the defendants never occupied the premises in question from the time they purchased them to the time of the levy, and that at the time the judgment was rendered and at the time of the levy the premises were vacant and unoccupied, except that they were inclosed by an old fence. We can only harmonize the facts gathered from the affidavit with those contained in the agreed statement of facts by concluding that whatever building materials had been placed on the lots were removed therefrom before the levy was made. It clearly appears from the whole record that the premises were never in fact occupied by the defendants as a homestead, and also that at the time the judgment was rendered and the levy made the lots were vacant and unoccupied.

The question is now presented for our consideration as to whether the purchase of this property for a homestead, and the intention in the minds of these parties to make it a homestead in the future, is sufficient to supply the requirement of occupancy contained in the constitution. Section 9, art. 15, of the constitution reads as follows: "Sec. 9. A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon: provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife."

This section of the constitution has been considered and construed by this court in numerous cases. In the case of *Edwards v. Fry*, 9 Kan. 417, Mr. Justice Brewer, speaking for the court, used the following language: "We know the spirit which animates the people of Kansas, the makers of our constitution and laws, on this homestead question. We note the care with which they have sought to preserve the homestead inviolate to the family. We have no disposition to weaken or whittle away any of the beneficent constitutional or statutory provisions on the subject. We know that the purchase of a home-

stead, and the removal onto it cannot be made momentarily contemporaneous. It takes time for a party in possession to move out, and then more time for the purchaser to move in. Repairs may have to be made, or buildings partially or wholly erected. Now, the law does not wait till all this has been done, and the purchaser actually settled in his new home before attaching to it the inviolability of a homestead. A purchase of a homestead with a view to occupancy, followed by occupancy within a reasonable time, may secure ab initio a homestead inviolability. Yet occupation is nevertheless an essential element to secure this inviolability."

Again, in the case of *Monroe v. May*, 9 Kan. 466, it was held: "A purchase of a homestead with a view to occupancy, followed by occupancy within a reasonable time, receives from the time of purchase a homestead exemption from seizure upon execution or attachment." The facts in that case with reference to the occupancy are briefly these: Monroe, the judgment debtor, owned a farm, which he sold in November, 1870, receiving in exchange a house and lot in Atchison and \$1,600 in notes. Possession, by agreement, was to be exchanged on the 1st of March following. The exchange was so made, and this city property was occupied and claimed by Monroe and wife as their homestead. The court in that case came to the conclusion that the Monroes became actual occupants of this property within a reasonable time after its purchase, and that it was exempt to them as a homestead. The time intervening between the purchase and taking possession was four months or less.

Again, in the case of *Gilworth v. Cody*, 21 Kan. 702, it appeared that Cody, on December 1, 1877, purchased 80 acres of land for the purpose of present use as a residence. The land was vacant at the date of the purchase. Cody commenced at once to dig a cellar, and haul stone for a dwelling house. On December 5th, he started to a neighboring town to purchase materials out of which to erect a dwelling house. He made such purchase, and returned with the materials on December 7th. He unloaded the materials adjoining the premises on the same day the premises were levied on under the order of attachment. Cody continued the construction of his dwelling house, and completed the same December 28, 1877, and moved at once with his family into the dwelling, and occupied it as the residence of himself and family. Chief Justice Horton, in delivering the opinion of the court, used the following language, after having reviewed the authorities on the subject: "These decisions clearly establish the doctrine that our homestead laws, beneficial in their operation, and founded in a wise policy, should be liberally construed, so as to carry out their spirit. Considered in this light, in this case there was such an actual purpose and intention of present occupancy, accompanied with such acts on the part of the defendant in error in the commencement and completion of his dwelling, together with his residence therein with his family, that this might reasonably be held to amount in substance to

actual occupancy at the date of the levy. While, therefore, we hold, within the terms of the law, that occupation is an essential element to secure a homestead inviolability, under the exceptional circumstances which appear from the findings of the court, the intentions and acts of the purchaser of the land in controversy may be construed into a legal equivalent of actual occupancy of such premises. Law is entitled to and can command respect only when it is reasonable, and adapted to the ordinary conduct of human affairs; and the construction we have given above to the provisions securing homestead exemptions is certainly within their spirit, and more in consonance with a reasonable interpretation thereof, than if we adopted the opposite conclusion."

Counsel for the plaintiffs in error calls our attention to the case of *Reske v. Reske*, 51 Mich. 541, 16 N. W. 895, 47 Am. Rep. 594. The opinion in that case was delivered by Justice Cooley, and carries the doctrine of constructive occupancy for a homestead to the furthest limit yet reached by any court, so far as we have been able to review the authorities. It appeared in that case that the defendant purchased the lot in controversy in Detroit in January, 1880. He was a single man at the time of the purchase, but soon thereafter married. He then fenced the lot, and commenced making use of it. He built a barn and shed, dug a well, kept his horses, his hogs, and his poultry, and also piled wood, which he kept for sale, on the lot. At first he lived at some considerable distance, but afterwards took board across the way, and remained there while building. In the spring of 1881 he obtained figures from a builder on the cost of a house, but, not being able to go on, he did not then build. It was towards the end of 1882 before they were able to put up a house, and they were not living in it till 1883. In November, 1882, judgment was taken against the defendant, and execution levied on the lot. The court in that case comments on the fact that the defendant was all the time in the actual occupancy of the lot, and was from time to time, doing various acts tending towards the construction of such buildings and conveniences as were required in order to make it a home. The period of time intervening between the purchase of the lot and the levy of the execution was a few months longer than in this case. It will be noted, however, that in this case it is expressly admitted that there was not at any time actual occupancy of the premises by the defendants from the time of the purchase till the date of the levy. In that case the defendant testified, and the court quotes from his testimony the following language, "I built every day as soon as I got a little money ahead." The court evidently took the view of the case that the defendant's delay in the construction of his dwelling house was due solely to his poverty, and that he was all the time making a determined effort to actually fit the premises for occupation by himself and family. He not merely had the purpose in his mind to make the lot his homestead, but was actually at work, from time to time, on the lot, preparing it for a home.

In the case of *Swenson v. Kiehl*, 21 Kan. 533, the syllabus of the case is as follows: "(1) Homestead occupation. Occupation, actual or constructive, is essential to give the character of homestead to premises. (2) * * * Intent when purchased. While occupation need not always be instantaneously contemporaneous with purchase to create a homestead, yet the purchase must always be with the intent of present, and not simply of future, occupancy." In that case the land was purchased by the execution debtor on November 13, 1876. The judgment on which the execution was issued was rendered in 1873. One execution was issued February 5, 1877, and another February 23, 1877. The sale was made under the latter execution. There was a house on the land, but the defendant failed to occupy it as a residence for more than a year after the purchase, and in that case Mr. Justice Brewer, in the opinion, says: "'Occupied as a residence by the family of the owner,' is the language of the constitution defining a homestead exemption. We are aware that occupancy is not always possible at the instant of purchase, and that, as we have heretofore said, a reasonable time is allowable in which to prepare for and to complete the removal and occupation of the intended homestead, but the purchase must be for the purpose and with the intent of present, and not simply of future, use as a residence."

In the case of *Farlin v. Sook*, 26 Kan. 398, it was held: "Under the homestead exemption laws no person can hold property exempt from execution or forced sale unless the property is 'occupied as a residence by the family of the owner.' Therefore, where the owner of the property resides upon the same, but his family, consisting of a wife and children, have never been in Kansas, but reside in Illinois, and it is not, and never has been, the intention of the owner to bring them to Kansas, or to have them reside upon the property, held, that the owner cannot hold the property exempt from execution and forced sale under the homestead exemption laws." In the case of *Koons v. Rittenhous*, 28 Kan. 359, it appeared that a husband and wife resided in New York in 1871. The husband, desiring to change his place of residence, came to Kansas, and purchased real estate, and resided thereon for about four years, then sold the same, and executed a deed therefor, representing himself to be a single man. About a year afterwards the wife came to Kansas, and thereafter resided upon the land with her husband, and it had been at all times the intention of the husband and wife that she should at some time come to Kansas, and reside upon the land with him. It was held that the land had never been occupied as a residence by the family of the owner in accordance with the exemption law, and that the deed from the husband alone was therefore not void. Again, in the case of *Bradford v. Trust Co.*, 47 Kan. 587, 28 Pac. 702, in concluding the opinion, Chief Justice Horton says: "Under the constitution, there must be occupancy as a residence by some one of the family of the owner to constitute a homestead."

We do not think there is any real conflict in the authorities cited, nor do we think that the Michigan case goes to the limit which the plaintiff in error asks us to reach in this case. Whatever our views might be as to the propriety of allowing a debtor to hold a tract of land for a homestead, whether occupied or not, we are bound to declare the law as we find it, and, while this court in the cases cited has given the constitutional provision a liberal construction for the purpose of fully securing to needy debtors the beneficent exemption secured to them by the constitution, yet we may not wholly dispense with the requirement of occupancy. Can it be said that these lots, though vacant and wholly unoccupied for a period of more than two years, were in the constructive occupancy of the defendants, because they were purchased with the proceeds of a former homestead, and the defendants intended, as soon as they should be able to build thereon, to occupy them? If we hold these lots to have been a homestead during all this time, by what course of reasoning can we ever fix a limit within which actual occupancy must take place? The admission contained in the record that the defendants never occupied the lots or premises in question herein from the time they were purchased by the defendants, in March, 1887, up to the time subsequent to the making of the levy herein, (which was on August 19, 1889,) and that at the time of the levy the premises were vacant and unoccupied, seems to us to be decisive of this case; and that the defendants have admitted that occupancy by the family of the defendants did not exist, and therefore the defendants cannot claim the premises exempt to them as a homestead. The fact that the defendants took possession of the lots and constructed a house thereon after the levy of the execution cannot of itself defeat the lien of the judgment. *Bullene v. Hiatt*, 12 Kan. 98. The rights of the parties were fixed at the time of the levy, and no subsequent act of the debtor could change them.

We find no error in the rulings of the district court, and its orders will be affirmed. All the justices concurring.

McKAY v. GESFORD.

(Supreme Court of California, 1912. 163 Cal. 243, 124 Pac. 1016, 41 L. R. A. [N. S.] 303, Ann. Cas. 1913E, 1253.)

In Bank. Appeal from Superior Court, Modoc County; John E. Raker, Judge.

Action by Rose McKay, as special executrix of Julia D. Ferguson, deceased, against Frances Helen Gesford. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

PER CURIAM. This action is in ejectment. It was brought by plaintiff as special administratrix of the estate of Julia D. Ferguson, deceased, claiming that certain real property belonged to the estate of her intestate.

Defendant admitted that the property in question had originally been the separate property of Julia D. Ferguson, but averred and showed that Julia D. Ferguson, while the wife of A. H. Ferguson and while she with her husband was residing in the house upon the land in controversy, filed her declaration of homestead for the joint benefit of herself and her husband. Julia D. Ferguson having died, it is conceded that the property passed to the surviving husband (Civ. Code, §§ 1263, 1265; Code Civ. Proc. §§ 1474, 1475), if at the time of her death there was, under her homestead declaration, a valid subsisting homestead upon the property. Defendant and appellant is the grantee of the husband, claiming title by deed executed by him after the death of his wife. The court made voluminous findings, and from them reached the conclusion that in law the homestead declaration was invalid. Judgment passed for plaintiff, and from that judgment and upon the judgment roll defendant appeals, contending that the findings do not support the judgment.

The findings are that in 1884 Julia D. Ferguson, then Julia D. Edwards, a spinster, owned the land in controversy, and in 1884 constructed a building thereon consisting of four rooms "as and for a hotel, and to keep boarders and lodgers as she could accommodate." In 1888 she married A. H. Ferguson. At the time of her marriage she was residing "on said premises in the hotel building thereon, and continued to keep such boarders and lodgers as could be accommodated in said hotel building, and to run said hotel and hotel business with all the customers, boarders and lodgers that could be obtained." In 1891 or 1892 she "built two additional rooms onto said hotel building." She continued thus in occupancy, and use of the premises until her death. After her marriage with her husband in 1888 she with her husband continuously resided upon the premises and "in the hotel building thereon," and this was their sole and only home and residence. She was so residing with her husband upon the premises, when in 1894 she made the homestead declaration in due and regular form, claiming the premises as a homestead for the joint benefit of herself and her husband. This homestead declaration was duly acknowledged and recorded. "From the time of the erection of said hotel building on said premises described in the complaint, in the year 1884 and up to the 1st day of January, 1895, the said Julia D. Ferguson conducted a hotel on said premises, and her residence upon said premises and in said building was but incidental to the running of said hotel, and that the said building and premises were used primarily and principally as and for a hotel, and not otherwise." During all of this time "Julia D. Ferguson performed the principal labor necessary to keep the said hotel, did the cooking and waiting on table, and otherwise attended to the wants of her boarders and lodgers; but at times hired a cook and waiter girls, and other help, when necessary to run said hotel, and, after her marriage to the said A. H. Ferguson, the said A. H. Ferguson when not otherwise engaged would give his help and assistance to his wife in

and about the said hotel in doing the work and in conducting the same.

* * * Said hotel building was not dedicated to residence purposes primarily, and was actually used by said Julia D. Ferguson and was occupied for business purposes for the accommodation of the public.

* * * No particular room or rooms on the premises were reserved for the exclusive use of said Julia D. Ferguson and her husband, or either of them, but that she and her husband used any of them for themselves as was convenient, when not needed to be used by their boarders and lodgers, and that no particular portion of the premises was used exclusively, primarily, or principally for a home by either of them.

* * * A sign bearing the words 'Star Hotel' was continually kept on the building from the time of its construction, and a bell was rung at regular intervals at meal hours to call persons to meals; that occasionally advertisements of the Star Hotel were published in a newspaper by the said Julia D. Ferguson, and that Julia D. Ferguson solicited many of the business men of the town to send her patronage to her hotel." At no time were the premises of a greater value than \$1,000. The residence of Julia D. Ferguson before her marriage and of herself and her husband after their marriage upon the premises in question "had been and was but incidental to the running of the hotel business and conducting of a hotel business thereon; and the said building on said premises was used and occupied by said Julia D. Ferguson and by said Julia D. Ferguson and said A. H. Ferguson, at all the times herein specified and found in these findings, primarily and principally and chiefly as and for a hotel to accommodate the public, and not otherwise.

Finding 20: "That said lands and premises, together with the building thereon known as the Star Hotel, being occupied and used as hereinbefore found, primarily and principally and chiefly as and for a hotel and doing a hotel business, and the residence of the said Julia D. Ferguson and A. H. Ferguson in said hotel and on said lands and premises being but incidental at all times to the running of said hotel and not primarily and principally as a home, said house known as the Star Hotel, and the land and premises which it occupied, being the lands and premises described in the complaint, was not, nor was any part thereof, impressed as a homestead and with the homestead character as homestead property, and was not a valid homestead. And said building known as the Star Hotel, and the premises being occupied and used as hereinbefore found could not be impressed with the title and character of a valid homestead interest, nor was it thus impressed, and it did not exist as a valid or any homestead of said Fergusons or of either of them."

All of the above quotations are from the findings, and by finding 20 quoted in extenso it will be seen that the court there makes its ultimate finding of fact from the probative facts previously found. It is, of course, well settled that a general and ultimate finding such as that declared in finding 20 which is drawn as a conclusion from facts previously found cannot stand if the specific facts upon which it is based do

not support it. *Sav. & Loan Socy. v. Burnett*, 106 Cal. 540, 39 Pac. 922; *McDonald v. Randall*, 139 Cal. 254, 72 Pac. 997.

The question, then, before us is whether the ultimate finding of the court, namely, that by reason of the facts previously found the property could not be impressed with the homestead characteristic is or is not supported. It was recognized at a very early day that questions of difficulty would arise under our homestead law touching the character of the property sought to be exempted under its provisions. *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516. It is there said "that the question whether property devoted chiefly to business purposes can be subjected to a homestead claim is full of embarrassment." But, when it is borne in mind that the homestead law is a beneficent law calling for liberal construction (*Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404), we think all difficulty will be removed and all doubt resolved by the following suggestion: If under these identical circumstances of ownership of the property, of the construction of the building thereon, and of the use of that building Mrs. Ferguson, instead of being a married woman with a husband, had been a widow with minor children to support, and an attack had been made upon a declaration of homestead which she had duly made and recorded upon the property, would any court say, or would any one say, that, notwithstanding that it was the residence and sole and only home of herself and babies, it could not be impressed with the homestead characteristics because the principal purpose and use of the premises was its conduct by her as a hotel or boarding house in order that she might thus support herself and babies and give them a home? But the law is no different if you substitute a husband for the babies. The dominant and controlling fact still remains that this was the residence and home of the family, that it was suitable for the purpose, and was used for the purpose.

We are not in this case embarrassed by difficulties which have arisen in other cases where the character of the business maintained is one entirely foreign to the conception of a home, if not repugnant to it—such a case, for example, as is instanced by Chief Justice Field in *Ackley v. Chamberlain*, *supra*, of an effort to impress a gas factory with homestead characteristics because the owner lived in it. Here the very business which was carried on was conducted for the purpose of maintaining the home, for, if this be not so, then it must follow that any widow seeking to support herself and perhaps her children by taking boarders or lodgers under circumstances where it can be truly said that the principal business conducted upon the premises is that of a lodging house or a boarding house cannot have a homestead, although she is conducting this very business so as to maintain herself and her offspring in a home. Each case of this character stands by itself and is to be governed by its own facts. Our own cases have passed recently under review in *Estate of Levy*, 141 Cal. 646, 75 Pac. 317, 99 Am. St. Rep. 92. Without again reviewing them, it is sufficient to refer to this case. Therein, after extended consideration of our decisions, and

amongst them *Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404, where it is said, "Using a building partly or even chiefly for business purposes, or renting part of it, is not inconsistent with the right of homestead, provided it is and continues to be the bona fide residence of the family" this court said: "These cases are all authority for the proposition that, if a building is the actual bona fide residence of a party, he may legally select it and the land on which it is situated as a homestead, even though, incidentally, a part thereof, no matter how large, may be used by him for other purposes than those of family residence. There is no decision of this court in conflict with this view."

Under the rule of liberal construction which it has been repeatedly declared should be extended to homestead laws, in every permissible case where the premises are the bona fide home of the parties, it should be held that the business conducted within the premises is not the paramount and principal purpose, but the incidental and subordinate purpose; that the home is the main thing, not the business; that the business is conducted to enable the parties to maintain a home, and not that the parties are incidentally inhabiting the premises for the purpose of maintaining the business. Especially is this true in such a case as the one at bar, where it appears from the findings that the parties during all their married life never had any other home than their six-room hotel. Nor is it of determinative import that they occupied one or another of these six rooms or shifted themselves about as the exigencies of their business demanded. In some cases the actual occupancy of a room or rooms in a building has become important as evidence showing residence. These were cases like *Skinner v. Hall*, 69 Cal. 195, 10 Pac. 406, and *Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404, but in this case the permanent occupancy of one or another room is of no material significance, since it is shown that these spouses either lived and made their home and residence upon the premises in controversy, or they lived and made their home and residence nowhere.

It follows from the foregoing that the ultimate finding of the court to the effect that the property could not be impressed with the characteristics of a homestead is not supported by the specific facts upon which the finding is based, and that the judgment itself is therefore unsupported by the findings. Wherefore the judgment appealed from is reversed and the cause remanded, with directions to the trial court to enter its judgment for the appellant.

BEATTY, C. J., does not participate in the foregoing.

III. Loss of Homestead *

ROUSE v. CATON.

(Supreme Court of Missouri, Division No. 1, 1902. 168 Mo. 288, 67 S. W. 578, 90 Am. St. Rep. 456.)

Error to circuit court, Linn county; John P. Butler, Judge.

Suit by J. W. Rouse against Harry L. Caton and others. From a decree for plaintiff, defendants bring error. Affirmed.

BRACE, P. J. The defendants in this case are Luke T. Caton and his two sons, Leo T. Caton and Harry L. Caton. By deed dated August 26, 1895, acknowledged September 5, 1895, and recorded on the 20th of July, 1896, the said Luke T. Caton and wife conveyed to the said Leo T. Caton and Harry L. Caton the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 16, and the N. E. $\frac{1}{4}$ of section 21, in township 58, range 18, in Linn county, containing 280 acres. On the 23d of July, 1896, the plaintiff, J. W. Rouse, instituted a suit by attachment in the circuit court of said county against the said defendant Luke T. Caton, which was duly levied on said lands, and which was thereafter duly sustained, and therein, on the 26th of April, 1897, the plaintiff obtained judgment against the said Luke T. Caton in the sum of \$4,600.57 and costs. In pursuance of an execution issued on this judgment, the said real estate was duly sold, and the plaintiff became the purchaser thereof for the sum of \$2,000, received a sheriff's deed therefor, and thereafter instituted this suit.

The petition is in two counts,—the first in the nature of a bill in equity to set aside said deed of Luke T. Caton, of date August 26, 1895, on the ground that it was made without consideration, and for the purpose of hindering, delaying, and defrauding his creditors, and the second in ejectment, to recover possession of the premises. The finding on both counts was in favor of the plaintiff, and, defendants' motion for rehearing and new trial having been overruled, they bring the case here by writ of error.

The facts of this case, so far as they can be made out from the imperfect transcript of plaintiffs in error, which contains but a fragment of the evidence, eked out by that of the defendant in error, seem to be about as follows:

In 1890 Luke T. Caton was the owner of the 280 acres of land in controversy, which in connection with another 40-acre tract, the title to which was in his wife, constituted his home place, on which he resided with his family. He owned other lands and a one-half interest in a saloon in the town of Bucklin, some two or three miles distant from his home farm, and some personal property. He was then in com-

* For discussion of principles, see Burdick, Real Prop. § 70.

fortable circumstances, and entirely solvent. In the fall of that year he and his wife signed and acknowledged a deed conveying the home farm to one John C. Whittaker, and a few days thereafter the said Whittaker signed and acknowledged a deed conveying said premises to Fannie Caton, the wife of the said Luke T. Caton, and his two sons, Leo T. Caton and Harry L. Caton. These deeds were never recorded, and remained in the possession or under the control of the said Luke T. and his wife from the time they were so signed until they were produced on the trial of this cause. At the time these deeds were so signed and acknowledged his son Leo was aged about 20 years, and his son Harry was about 9 years old. It is conceded that these deeds were without valuable consideration. As counsel for defendants say in their brief, "This roundabout transaction was only to avoid a direct conveyance to the wife." Afterwards the deed in controversy, conveying the 280 acres aforesaid to the said Leo T. and Harry L. Caton, was signed by the said Luke T. Caton and wife, and acknowledged on the 5th day of September, 1895. This deed was also without any valuable consideration, and remained in the possession and under the control of the said Luke T. and his wife until it was filed for record on the 20th of July, 1896.

Up to the time of the filing of this deed for record Luke T. Caton always claimed and treated this land as his own, gave it into the assessor, paid the taxes on it, and incumbered it by mortgage, and was considered by every one dealing with him as its owner, and neither Leo T. nor Harry L. ever made any claim of ownership to it. In the spring of 1891 Luke T. Caton, with his family, except his son Leo, moved from his home farm to the town of Bucklin, distant two or three miles therefrom, where he and his family continued thereafter to reside until about the middle of May, 1897, when they moved back to the home farm. In the meantime Leo was left in charge of the farm, its stock, and equipment, with the understanding between him and his father that he should run the place, and if anything was made in operating it he should have half the profits. On removing to Bucklin, Luke T. Caton purchased an interest in a flouring mill in operation there and other property, and, after renting for a short time, purchased a dwelling house and lot on the 3d of August, 1891, into which he then moved with his family, and where thereafter they continued to reside until about the middle of May, 1897, when he returned to the farm. The purchase money for this homestead was paid by Luke T. Caton, but the deed was taken in the name of his wife, and duly recorded December 16, 1893. Thus the said Luke T. Caton continued living with his family in this homestead in Bucklin, carrying on his farming, milling, and saloon business, from the spring of 1891 until the fall of 1895, during which time he incurred an indebtedness in excess of the value of all his property, and became insolvent. It was under these circumstances that the deed in question was thereafter made. The plaintiff's debt was one of the many incurred by him during this period on the

faith of his ownership of this 280 acres of land in question, and other lands, as shown by the records.

No error is assigned upon any action of the court in the trial of the case. But a reversal of the decree and judgment is urged on the ground:

First. That Luke T. Caton had a homestead in this land which was not set off to him before the sale under the execution, hence under the rulings of this court in *Macke v. Byrd*, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649; *Ratliff v. Graves*, 132 Mo. 76, 33 S. W. 450, and *Creech v. Childers*, 156 Mo. 338, 56 S. W. 1106, the sale was void. This contention is not tenable. At the time when the indebtedness of Luke T. Caton to the plaintiff was incurred, when he was sued thereon by attachment, and the writ levied on the premises, and even when judgment therein was rendered against him, he was living with his family on his homestead in the town of Bucklin. This was none the less his homestead (as he declared he intended it to be at the time he purchased it) because he took the deed thereto in his wife's name. While he continued to own the farm of which the 280 acres sold under execution was a part, and in which he formerly had a homestead, he had abandoned it as a homestead in 1891, and as against the rights which had accrued to the plaintiff after that time, and before his return to it in 1897, he had no homestead right therein. It requires both ownership and occupancy to constitute a homestead, and no head of a family can have two homesteads at the same time; neither can husband and wife, while living together, each have a separate homestead at the same time. *Thomp. Homest. & Ex.* §§ 225, 245, 246; *Freem. Ex'ns*, § 248; 15 Am. & Eng. Enc. Law, pp. 566, 575, 602; *Association v. Howard*, 150 Mo. 445, 51 S. W. 1046; *Peake v. Cameron*, 102 Mo. 568, 15 S. W. 70; *Kendall v. Powers*, 96 Mo. 142, 8 S. W. 793, 9 Am. St. Rep. 326; *Bunn v. Lindsay*, 95 Mo. 250, 7 S. W. 473, 6 Am. Rep. 48; *Finnegan v. Prindeville*, 83 Mo. 517.

Second. That, as the amount plaintiff bid at the sale, less the costs, was credited on the execution, and no new consideration passed, the plaintiff was not an innocent purchaser, but took his title subject to all infirmities. The rule of *caveat emptor* applies, and the unrecorded deeds conveying the 280 acres by Luke T. Caton and wife to Whittaker, and from Whittaker to Luke T. Caton's wife, and his sons Leo and Harry Caton, in 1890, when Luke T. Caton was entirely solvent, stand good and valid as against the plaintiff. This is an attempt to protect one fraud by another. It is true that, if the deeds of 1890 had been delivered and recorded when they were signed and acknowledged, they would have vested Luke T. Caton's title in the grantees therein named as against subsequent creditors. But these deeds were never in good faith delivered for the purpose of vesting title in such grantees, but ever remained either in the possession or under the dominion and control of Luke T. Caton from the day of their date until they were produced on the trial of this cause, until which time neither plaintiff nor any other

of his creditors had any notice of their existence, and were purposely kept off the records, whereby he was enabled, on the faith of his ownership of these and other lands, to incur the very indebtedness which he now seeks to defeat by them. They were fraudulent and void as to plaintiff, and as to such creditors passed no title as against the plaintiff, and the court committed no error in vesting the title in the plaintiff and in awarding him the possession of the premises.

The decree and judgment of the circuit court will therefore be affirmed. All concur.

ESTATES LESS THAN FREEHOLD

*(A) Estates for Years*I. Leases ¹

1. MUST BE IN WRITING WHEN

MATTHEWS v. CARLTON.

(Supreme Judicial Court of Massachusetts, 1905. 189 Mass. 285, 75 N. E. 637.)

Appeal from Superior Court, Worcester County.

Action of contract by Robert F. Matthews against Herbert E. Carlton. Judgment was rendered for defendant upon agreed facts, and plaintiff appealed. Affirmed.

KNOWLTON, C. J. This case comes before us on an agreed statement of facts, by which it appears that, in the early part of June, 1904, the defendant "orally agreed to hire a tenement of the plaintiff * * * at \$25 per month, beginning on the 1st day of July, 1904." The tenement was then occupied by a tenant, who was to hold it until July 1, 1904, and who paid the plaintiff his rent up to that date. With the consent of this tenant, who was then occupying the tenement, the defendant moved a part of his goods into the tenement. The tenant afterwards moved out, and the defendant moved other goods in, but subsequently, before the 1st day of July, moved all the goods out and notified the plaintiff that he should not take the tenement. The question is whether the defendant is liable to the plaintiff for rent for the month of July. His moving a part of his goods into the house in June, with the consent of the tenant then in possession, and his subsequent removal of them before the expiration of the term of the tenant, does not affect his rights. He was not in possession under his contract with the plaintiff, and he never became a tenant of the plaintiff. He never entered under his agreement, but, on the contrary, before the time when his term was to begin he gave the plaintiff notice that he should not enter.

By Rev. Laws, c. 127, § 3, it is provided that an estate or interest in land, created without an instrument in writing signed by the grantor or his attorney, shall have the force and effect of an estate at will only, and that "no estate or interest in land shall be assigned, granted, or surrendered, unless by such writing or by operation of law." The oral agreement, therefore, gave the defendant no estate or interest in the land, and under this section, as well as under Rev. Laws, c. 74, § 1, cl. 4, no action could be maintained for the enforcement of it.

The plaintiff's declaration contains two counts—one for so-called

¹ For discussion of principles, see Burdick, Real Prop. § 77.

rent or for use and occupation, and the other for damages for a breach of the oral agreement. The first count cannot be maintained, because the relation of landlord and tenant never existed between the parties. The defendant declined to become the plaintiff's tenant before the time fixed for the beginning of the term. There can be no liability of this kind without an occupation by a tenant, actual or constructive, as well as a contract, express or implied. *Rogers v. Coy*, 164 Mass. 391, 41 N. E. 652; *Bacon v. Parker*, 137 Mass. 309-312; *Central Mills v. Hart*, 124 Mass. 123; *Leonard v. Kingman*, 136 Mass. 123; *Merrill, Adm., v. Bullock*, 105 Mass. 486; *Easthan v. Anderson*, 119 Mass. 526-531; *Larkin v. Avery*, 23 Conn. 304. The second count is upon an agreement which is within the statute of frauds. *Rev. Laws, c. 74, § 1, cl. 4*; *White v. Wieland*, 109 Mass. 291; *Parker v. Tainter*, 123 Mass. 185.

Judgment for the defendant.²

² The following note is appended to this case in the *Northeastern Reporter*: "A parol demise, void under the statute of frauds, creates a tenancy at will only; but this may be changed into a tenancy from year to year, by payment and acceptance of rent; but a subsequent ratification, so as to make it a valid lease, must be in writing. *Dumn v. Rothermel*, 112 Pa. 272, 3 Atl. 800 (1886). An oral agreement to renew a lease for three years is extinguished by a subsequent written lease for one year. *Stuebben v. Granger*, 63 Mich. 306, 29 N. W. 716 (1886). See, also, *Kramer v. Amberg* (Sup.) 3 N. Y. Supp. 240 (1888). A verbal agreement to rent for one year at a certain price per month, and for a second year at a different price per month, creates a tenancy from year to year, and not at will. *Schneider v. Lord*, 62 Mich. 141, 28 N. W. 773 (1886). A lease which has been reduced to writing, acted on, and partly performed, is binding, though not signed. *Farmers' Loan & T. Co. v. St. Joseph, etc., R. Co.* (C. C.) 2 Fed. 117 (1880). A lease which is void, because resting in parol, may be rendered valid for the full term by part performance. *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565 (1884); *Wallace v. Scoggin*, 18 Or. 502, 21 Pac. 558, 17 Am. St. Rep. 749 (1890). A note for rent given by a lessee under a parol lease is, with letters referring to it, a sufficient memorandum to take the lease out of the statute of frauds, as against the lessee. *Oliver v. Insurance Co.*, 82 Ala. 417, 2 South. 445 (1886). A parol lease for a year is not rendered invalid by the fact that it is to commence in futuro, and thus cannot be performed within a year. *McCroy v. Toney*, 66 Miss. 233, 5 South. 392, 2 L. R. A. 847 (1888). A tenancy from year to year cannot be created by an oral agreement to work land on shares for a term of five years, followed by occupancy of the land for two years under the agreement. *Unghish v. Marvin*, 55 Hun, 45, 8 N. Y. Supp. 283 (1889)."

BURD.CAS.REAL PROP.—8

II. Rights and Liabilities of Landlord and Tenant *

1. UNDER IMPLIED COVENANTS

DOYLE v. UNION PAC. RY. CO.

(Supreme Court of United States, 1893. 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223.)

In error to the circuit court of the United States for the district of Colorado.

These were two actions brought by Marcella Doyle against the Union Pacific Railway Company, one of them being for personal injuries to herself, and the other to recover for the death of her children; such injuries and death being caused by a snowslide which destroyed the house in which she was living, and which she had leased from the defendant company. There were verdict and judgment for defendant, and plaintiff appeals. Affirmed.

Mr. Justice SHIRAS delivered the opinion of the court.

In the early part of November, A. D. 1883, Marcella Doyle, a widow with a family of six children, agreed with the Union Pacific Railway Company to occupy the company's section house situated on the line of the railroad at or near Woodstock, in the county of Chaffee and state of Colorado, and to board at said section house such section hands and other employes of the company as it should desire at the rate of \$4.50 per week, to be paid by the persons so to be boarded, and the company agreed to aid her in collecting her pay for such board by retaining the same for her out of the wages of the employes so to be boarded.

Mrs. Doyle moved with her children into the section house, and continued in the discharge of her duties as boarding housekeeper until the 10th day of March, A. D. 1884, when a snowslide overwhelmed the section house, injured Mrs. Doyle, and crushed to death the six children residing with her.

Subsequently, Marcella Doyle brought, in the circuit court of the United States for the district of Colorado, two actions against the Union Pacific Railway Company,—one for her personal injuries; the other for damages suffered by her in the loss of her children,—and which latter action was based on a statute of the state of Colorado.

The actions resulted in verdicts and judgments in favor of the defendant company, and the cases have been brought to this court by writs of error. As the cases turn upon the same facts and principles of law, they can be disposed of together.

The record discloses that the facts of the case, as claimed by the re-

* For discussion of principles, see Burdick, Real Prop. §§ 78-80.

spective parties, and certain admissions by the defendant company, were stated in a bill of exceptions, and upon which instructions by the court were given which are made the subject of the assignments of error.

The bill of exceptions was as follows:

"Be it remembered that on the trial of this cause, at the November term, A. D. 1886, of the said circuit court, the defendant admitted, and such admissions were received in evidence before the jury:

"That the plaintiff was at the several times named in the complaint a widow and the mother of the said Martin Doyle, Andrew Doyle, Christopher Doyle, Catharine Doyle, Marcella Doyle, and Maggie Doyle, mentioned and named in the complaint as the children of the plaintiff, and as having each and all been killed by a snowslide at Woodstock in the month of March, A. D. 1884.

"That her husband and the father of said children had died previously to their death. That each of said children was of the age and sex stated in the complaint; was each unmarried and had no child nor children, and had each lived with their said mother, making their home with her, up to the time of their death; and were each then living with the plaintiff, aiding and assisting her in and about making a living, and in and about her duties and labors in the keeping of the section house of the defendant at Woodstock, in the county of Chaffee and state of Colorado, where said children were killed. That said children were all killed while in said section house, on the 10th day of March, A. D. 1884, by a snowslide, which then and there occurred from the mountain side above said section house. That said section house was built and used by the defendant as and for a section house and a place at which the section hands of the defendant who should work on said section could board and lodge.

"That on or about the 5th day of November, A. D. 1883, at the instance and request of the defendant, and for the mutual benefit of herself and the defendant, the plaintiff undertook and agreed with the defendant to keep for it, during its will and pleasure, its section house situated at or near Woodstock, on the line of its railroad, in the county of Chaffee and state of Colorado. That by the said agreement between her and the defendant the plaintiff was to provide and furnish board at said section house for such section hands and other employes of the defendant as it should desire, at the rate of four and one-half dollars per week, to be paid by the persons so furnished with such board; but the defendant was to aid and assist the plaintiff in collecting her pay for such board by stopping and retaining the same for her out of the wages of those so furnished with such board. That plaintiff thereupon, to wit, on the said 5th day of November, A. D. 1883, moved into said section house with her family, and entered upon the discharge of her duties as the keeper thereof, and remained there in the discharge of such duties until the occurrence of the snowslide, on the 10th of March, A. D. 1884. That the defendant did not at any time

notify or apprise the plaintiff or either of her said children, or cause her or either of them to be notified or apprised, of the danger of a snowslide or snowslides or of the liability of a snowslide or snowslides at such place where said section house then was, or in that locality.

"And the plaintiff, further to maintain the issues on her part, introduced evidence tending to show that said section house was a one-story frame building, and was constructed in 1882, about the time that said railroad was first operated in that section of the country; was situated in the mountains, near the base of a high and steep mountain, and in a place subject to snowslides, and dangerous on that account. That the sides of the mountain at the base of which was the house in question were marked by the tracks of former snowslides, but only those familiar with snowslides and their effects would know what they meant. That the defendant was aware of said danger at and before the time it engaged the plaintiff to keep its said section house. That the plaintiff and her said children had never before resided in a region of country subject to snowslides, and had no knowledge of snowslides or of their indications, or of the dangers incident thereto, and was not aware of the particular danger in question. That there was a prominence or hip on this mountain side, about ten or twelve hundred feet above the section house, which cut off a view of the mountain side above said hip from the section house or its immediate vicinity. That above said hip there was a large depression or draw on the mountain side extending from said hip to the summit, into which great quantities of snow fell and drifted during the winter season of each year, thus tending to create snowslides of danger to persons in said section house or its vicinity. That this danger was not apparent even to a person having knowledge of snowslides and their causes without a view or examination of this mountain side above said hip. That the altitude of said section house was about 10,200 feet, and of the summit of said mountain nearly 12,000 feet. That the snowfall there was great in the winter season of each year, and that depressions on the mountain side were filled with snow by drifting. That the snowslide of March 10, 1884, which killed the said children, proceeded from this depression above said hip. That a snowslide of less dimensions, and of less scope and extent, occurred there in February, 1883, in the same place and from the same source, which reached to within about two hundred feet of said section house, and of which the defendant had knowledge at the time thereof.

"That the attention of the superintendent of the construction of said railroad and of said section house was called to the fact of such danger, at or about the time said section house was built, by one of the civil engineers of said defendant who assisted in locating the line of said railroad.

"That her said son Andrew Doyle was an employé of the defendant—a section hand on the same section where said section house was located—at the time he was so killed by said snowslide. That the plain-

tiff and her said children were in said section house at the time the said children were killed, and that neither of said children were aware of said danger before the said snowslide of March 10, 1884, occurred.

"That through this prominence or hip on the mountain side there was a chasm or draw from twenty to thirty feet wide, which continued on down to the section house, but became wider after leaving the hip. That with this draw another draw united about midway between the section house and the said hip, and formed one draw from their point of union to the section house.

"That this mountain is a part of the range of mountains known as the 'Continental Divide,' which divides the waters of the Atlantic from those of the Pacific. At this point above Woodstock station the course of the mountain is nearly east and west. This railroad passes this mountain by means of a tunnel called 'Alpine Tunnel,' which is to the westward of a line north of Woodstock, and descends this mountain at a heavy grade, along the side thereof, about midway between the section house and the said hip on the mountain, (which hip is termed a 'projection of rocks' by some of the witnesses,) and passes on to the eastward of Woodstock a considerable distance, where it turns, and, forming a kind of horseshoe shape, runs back again past Woodstock, but between the section house and said hip,—the section house being below and distant from this lower track about two hundred and thirty feet; and the two tracks forming this horseshoe are both between the section house and said hip, and on a direct line from the section house up to the hip. The two tracks are about five hundred feet apart, the upper track being about seventy feet higher in point of altitude where they cross this line from the section house to the hip on the mountain side above. That there was a water tank on the upper side of the lower track fifty or sixty feet to the westward of the section house, which water tank was injured by the snowslide of February, 1883.

"That the snowslide of March 10, 1884, spread out as it descended the mountain, so that where it passed over the lower railroad track its space in width was six or seven hundred feet, and the section house was not far from the center of said snowslide track.

"That the contour of this mountain, beginning at the section house and ascending the mountain, is about as follows, to wit: Above the section house it slopes slowly to the first railroad track; then there is a rockslide; then there is a bench above that, and on the same level of the upper railroad track, and above that a steep gorge, and on each side of said gorge there is a thin belt of timber, and between these belts of timber and along the gorge there is a space from three to four hundred feet in width of nothing but rock, with a very steep slope, and above this slope some very steep rocks, (the hip on the mountain side,) and above this hip is a large basin or depression extending on up the mountain side three or four thousand feet long to the summit of the mountain, which has an elevation or altitude of about 11,500 feet, the mountain side above the hip being very steep, having a slope

of more than thirty-three degrees, and from the hip down there is quite a precipitous piece of rock, not perpendicular, but quite steep, and after or below that the slope is at an angle of about twenty-five degrees. In the basin above the hip there is no timber, and in and about the section house there is a space of eight or nine hundred feet square on which there is no timber except three or four trees.

"That the timber on the mountain side was sparse and scattered. That only a few trees were carried down by the snowslide. That snowslides do not always follow beaten tracks made by former snowslides on the same mountain side, but frequently depart therefrom. That the snowslide of March 10, 1884, separated into broken fragments or divisions before reaching the base of the mountain, one of which struck the section house, resulting in the injuries complained of.

"That the winter of 1883-84 was severer, and the snow fell some deeper, than the winter previous thereto, and that it snowed heavily and continuously from about the 1st of March to the 10th of March, 1884, and the trains had ceased to run on account of the snow. That ordinarily in the winter season the snow was from five to seven feet deep in said locality in places where it did not drift, and after it had settled compactly. That it drifted greatly, filling up basins and depressions on the mountain sides. That there were rockslides and existing evidences of former snowslides on this mountain side above said section house.

"That the snowslide of February, 1883, deposited snow and débris on the upper track of the railroad above said section house from twenty to twenty-five feet deep; and for a considerable space of time from then, during the remainder of that winter and the following spring, the said railroad was not operated on account of the snow.

"And the defendant, to maintain the issues on its part, introduced evidence tending to prove that said section house was built below the said tracks and behind, and protected by a thick growth of timber above and between said section house and the mountain; that there were no marks or tracks of former snowslides directly above or in the vicinity of said section house; that the defendant was not aware of any danger from snowslides at the place where the section house was built, but, on the contrary, that the officers of the company had carefully examined the locality where the same was built, and the contour of the mountains above the same to the summit of the range, and that said section house was built at that place because the officers of the company thought that it was — safe place, and could not be endangered by snowslides, which were apt to occur in that part of the country; that the prominence or hip spoken of was a protection against snowslides which might occur on the mountain sides above said section house; that an examination of the ground, timber, and rocks in the vicinity of where the house was built, and above, on the mountain side, showed that there had not been a snowslide there for at least two hundred years; that the snowslide of March 10, 1884, was caused

by a storm of unprecedented severity and duration, and that the same came down through the timber above said house, breaking down and carrying with it standing trees, from bushes up to trees two feet in diameter; that the snowslide mentioned as occurring in February, 1883, came down a considerable distance to the north of where the one came down in 1884, and that the snowslide in 1883 did no damage except to cover up a short distance of the railroad track, and break in some boards of the house under the water tank; that the attention of the superintendent of construction of said railroad was not called by any one to the fact of there being any danger from snowslides at the place where said section house was built, but that the conversation or notice referred to was in regard to a place a mile or more further up Quartz creek; that the said Andrew Doyle had been an employé of the defendant as a section hand, but had quit work some days before on account of the road being blockaded by snow, and all attempts to open it having been abandoned, and for ten days or more before the snowslide no work whatever was being done by defendant on said road for a distance of several miles each way from said Woodstock; that said prominence or hip on the mountain side mentioned by the witnesses tended to protect said section house and its immediate locality from snowslides; that there was no chasm or draw immediately above said section house, and that whatever formation of that kind there was on said mountain was a distance of two hundred feet or more north of said section house; that said section house was broken down by said snowslide of March 10, 1884, by a spreading out of the snow as it came down the mountain, and that said section house was on the southerly side of said snowslide; that the gorge referred to is simply an opening a few feet wide in the ridge of rock referred to as the 'hip' or 'prominence;' that a short distance above said prominence the general timber line of the country is reached, above which no timber occurs; that there was a considerable amount of timber between said section house and the first railroad track, and a thick growth of large timber immediately above the first railroad track, extending up some distance towards the second track of the loop, and some scattering timber above the upper track; that there are no rockslides or existing evidences of former snowslides on the mountain sides immediately above said section house.

"And the foregoing was all the evidence in the case."

To the answers of the court to the prayers for instructions, and to the charge, the plaintiff has filed 13 assignments of error.

The twelfth assignment alleges that "the circuit court erred in charging the jury substantially to the effect that they must find for the defendant;" and in the brief of the plaintiff in error it is asserted that the answers of the court to the several requests for instructions were in effect directions to the jury to find for the defendant.

Although, in point of fact, the court did not give the jury peremptory instructions to find for the defendant, but left the cases to them

on instructions under which they might have found verdicts for the plaintiff, yet the validity of the plaintiff's exceptions to the court's treatment of the cases may be conveniently tested by assuming, for the present, that the charge and instructions legally amounted to a direction to find for the defendant. If an examination of the facts and of the principles of law involved warrants us in concluding that the court would have been justified in so doing, it will not be necessary to consider each and every assignment of error, nor to minutely scan isolated expressions used by the court.

The first question to be determined is, what was the relation between the plaintiff and the railway company? Was Mrs. Doyle a servant or employé of the company, aiding in the transaction of its business and subject to its directions, or was she a tenant at will holding the premises by an occupation during the will of the company? The facts averred by the plaintiff show that the company was not interested, in a legal sense, in the management of the boarding house; did not receive the board money, pay the expenses, take the profits, or suffer the losses. The company could not call upon her for any account, nor could she demand payment from the company for any services rendered by her in carrying on the boarding house. The fact that the company agreed to aid her in collecting what might be due to her from time to time by the boarders, by withholding moneys out of the wages payable to them by the railroad company, did not convert Mrs. Doyle into a servant of the company, or change her relation to the company as a tenant at will of the company's house. Such an arrangement might equally have been made if Mrs. Doyle had been the owner of the house. The court below was not in error in holding that the relation of the parties was that of landlord and tenant.

If, then, such was the relation of the parties, upon what principle can a liability for the damages occasioned by the snowslide be put upon the company? There was neither allegation nor proof of fraud, misrepresentation, or deceit on the part of the defendant company as to the condition of the premises. Indeed, it was not even pretended that the catastrophe was in any way occasioned by the condition of the house.

It was, indeed, alleged that the section house was built near the base of a high and steep mountain, and in a place subject to snowslides, and dangerous on that account; that the company was aware of said danger; that the plaintiff and her children had never before resided in a region of country subject to snowslides, and had no knowledge of snowslides or of their indications, or of the dangers incident thereto; and that the company did not at any time notify or apprise the plaintiff or her children of the danger of snowslides or of the liability of snowslides at such place where said section then was, or in that locality; and upon this alleged state of facts it was contended that the jury had a right to find that the railway company was guilty of care-

lessness or disregard of duty towards the plaintiff such as to make it liable in these actions.

It is, however, well settled that the law does not imply any warranty on the part of the landlord that the house is reasonably fit for occupation; much less does it imply a warranty that no accident should befall the tenant from external forces, such as storms, tornadoes, earthquakes, or snowslides. The law is thus stated in a well-known work on Landlord and Tenant:

"There is no implied warranty, on the letting of a house, that it is safe, well built, or reasonably fit for habitation; or of land, that it is suitable for cultivation, or for any other purpose for which it was let; and where a person hired a house and garden for a term of years, to be used for a dwelling house, but subsequently abandoned it as unfit for habitation, in consequence of its being infested with vermin and other nuisances, which he was not aware of when he took the lease, the principle was laid down, after an elaborate review of all the cases where a contrary doctrine seemed to have prevailed, that there is no implied contract on a demise of real estate that it shall be fit for the purposes for which it was let. Consequently an abandonment of the premises under these circumstances forms no defense to an action for rent; and in all cases where a tenant has been allowed, upon suggestions of this kind, to withdraw from the tenancy, and refuse the payment of rent, there will be found to have been a fraudulent misrepresentation or concealment as to the state of the premises which were the subject of the letting, or else the premises proved to be uninhabitable by some wrongful act or default of the landlord himself. The lessor is not, however, always bound to disclose the state of the premises to the intended lessee, unless he knows that the house is really unfit for habitation, and that the lessee does not know it, and is influenced by his belief of the soundness of the house in agreeing to take it; for the conduct of the lessor may, in this respect, amount to a deceit practiced upon the lessee." *Tayl. Landl. & Ten.* § 382.

The principles applicable to the present case have been well stated in the recent case of *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471. The syllabus states the case and decision as follows:

"A tenant cannot maintain an action against his landlord for an injury caused by falling upon a stair in the tenement, the tread of which has been sawed out and left unsupported by a previous tenant, there having been full opportunity to examine the stair at the time of hiring, and no warranty of the fitness of the tenement having been given by the landlord; the only evidence of knowledge on the part of the landlord being that he knew the stair had been sawed out, that he tried it, and it bore his weight, and he thought it would bear anybody's weight."

The judge directed a verdict for defendants, and the supreme court sustained this ruling. *Field, J.*, giving the opinion of the court, said, (page 383:)

"There is no implied warranty in the letting of an unfurnished house or tenement that it is reasonably fit for use, [citing cases.] The tenant takes an estate in the premises hired, and persons who occupy by his permission, or as members of his family, cannot be considered as occupying by the invitation of the landlord, so as to create a greater liability on the part of the landlord to them than to the tenant. The tenant is in possession, and he determines who shall occupy or enter his premises, [citing cases.]

"In the case at bar there was no express or implied warranty, and no actual fraud or misrepresentation. If the action can be maintained it must be on the ground that it was the duty of the defendants to inform the tenant of the defect in the staircase. This duty if it exists, does not arise from the contract between the parties, but from the relation between them, and is imposed by law. If such a duty is imposed by law, it would seem that there is no distinction as a ground of liability between an intentional and an unintentional neglect to perform it; but in such a case as this is there can be no such duty without knowledge of the defect. There is no evidence of any such knowledge, except on the part of C. D. Hunking, and the other defendants cannot in any event be held liable, unless his knowledge can be imputed to them, as the knowledge of their agent in letting the premises. The evidence is insufficient to warrant the jury in finding that C. D. Hunking intentionally concealed the defect from the tenant; and the action, if it can be maintained, must proceed upon the ground of neglect to perform a duty which the law imposed upon the defendants.

"A tenant is a purchaser of an estate in the land or building hired; and *Keates v. Earl of Cadogan*, 10 C. B. 591, states the general rule that no action lies by a tenant against a landlord on account of the condition of the premises hired, in the absence of an express warranty or of active deceit. See, also, *Robbins v. Jones*, 15 C. B. (N. S.) 240. This is a general rule of caveat emptor. In the absence of any warranty, express or implied, the buyer takes the risk of quality upon himself. *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639; *Ward v. Hobbs*, 3 Q. B. Div. 150; *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608. This rule does not apply to cases of fraud."

This rule of caveat emptor has been applied also in many other cases, some of which we now refer to.

Keates v. Earl of Cadogan, above cited, was an action on the case. The declaration stated in substance that the defendant knew that the house was in such a ruinous and dangerous state as to be dangerous to enter, occupy, or dwell in, and was likely to fall, and thereby do damage to persons and property therein; that the plaintiff was without any knowledge, notice, or information whatever that the said house was in said state or condition; that the defendant let the house to plaintiff without giving plaintiff any notice of the condition of the house; and that plaintiff entered, and his wife and goods and business were injured. Defendant demurred to the declaration, and the court

unanimously sustained the demurrer. Jervis, C. J., giving the opinion, said, (page 600:)

"It is not contended that there was any warranty that the house was fit for immediate occupation; but it is said that, because the defendant knows it is in a ruinous state, and does nothing to inform the plaintiff of that fact, therefore the action is maintainable. It is consistent with the state of things disclosed in the declaration that, the defendant knowing the state of things, the plaintiff may have come to him and said, 'Will you lease that house to me?' and the defendant may have answered, 'Yes, I will.' It is not contended by the plaintiff that any misrepresentation was made, nor is it alleged that the plaintiff was acting on the impression produced by the conduct of the defendant as to the state of the house, or that he was not to make investigations before he began to reside in it. I think, therefore, that the defendant is entitled to our judgment, there being no obligation on the defendant to say anything about the state of the house, and no allegation of deceit. It is an ordinary case of letting."

The rule of caveat emptor was also applied in the recent case of *Woods v. Cotton Co.*, 134 Mass. 357, 45 Am. Rep. 344. Defendant was owner of a tenement house fitted for four families, and plaintiff was tenant at will, or wife of tenant at will. There were three stone steps leading down from the yard to the street, on which ice and snow had accumulated, and on which plaintiff slipped and received the injury complained of. There was evidence tending to prove that at the time plaintiff was injured she was in the exercise of due care. The jury viewed the premises. Plaintiff contended that the steps were of such material, and constructed in such manner, that they occasioned the accumulation of snow and ice thereon improperly, and that the defendant's omission to place a rail on either side, or to take other reasonable measures to prevent one from falling, was such negligence as would render the defendant liable; but the trial court held there was no evidence to go to the jury, and directed a verdict for defendant, and the supreme court sustained this ruling. Field, J., giving the opinion, says, (page 359:)

"There may be cases in which the landlord is liable to the tenant for injuries received from secret defects which are known to the landlord and are concealed from the tenant, but this case discloses no such defects in the steps. * * * [Page 361.] The ice and snow were the proximate cause of the injury.

"The exceptions state that no railing had ever been placed on either side of the steps, that the jury viewed the premises, and that it was contended 'that the steps were of such material, and constructed in such manner, that they occasioned the accumulation of ice and snow thereon improperly.' The steps were of rough-split, unhewn granite, and the 'structure of the steps remained unchanged from the time of the plaintiff's first occupancy of the tenement to the time she received

her injury.' The defendant was under no obligation to change the original construction of the steps for the benefit of the tenant."

Hazlett v. Powell, 30 Pa. 293, was an action of replevin, in which an apportionment of rent was claimed by the tenant of an hotel, on the ground that he had been partially evicted by the act of an adjoining owner in building so that the tenant's light and air from one side of his hotel were shut off or obstructed, and, as a result, that the hotel was rendered pro tanto unfit for the purpose for which it was intended to be used. There was an offer to prove certain facts, (page 294,) which the court states as follows, (page 297:)

"But the rejected proposition also contained an offer to prove that the lessor knew at the time of executing the lease that the adjoining owner intended building on his lot,—at what time is not offered to be shown,—and did not communicate this information to the lessees. We think he was not bound to do so, and that, if the evidence had been received, it would have furnished no evidence of fraud on the part of the lessor, or become the foundation in equity for relief of the lessees. The substance of the complaint regarded something that the lessor was no more presumed to know than the lessees. It was nothing which concerned the title of the lessor, or the title he was about to pass to the lessees. It was a collateral fact,—something only within the knowledge and determination of a stranger to both parties; and, if material to either, I can see no obligation resting on either side to furnish to the other the information. It was not alleged that the lessor made any representations on the subject, or that there was any concealment of the information; or that any relation of trust and confidence existed between the parties; or that the lessees were misled by his silence, and entered into the contract under the belief that the vacant lot would not be occupied; or that they were in a position in which they could not by diligence have ascertained the fact for themselves, and that they were not legally bound to take notice of the probability that the ground would be occupied by buildings, and inquire for themselves. These were elements to be shown to constitute fraud, and make the testimony available.

"The general rule, both in law and equity,' says Story on Contracts, (section 516,) 'in respect to concealment, is that mere silence in regard to a material fact which there is no legal obligation to disclose will not avoid a contract, although it operates as an injury to the party from whom it is concealed.' But the relation, generally, which raises the legal obligation to disclose facts known by one party to the other, is where there is some especial trust and confidence reposed, such as where the contracting party is at a distance from the object of negotiation, when he necessarily relies on full disclosure; or where, being present, the buyer put the seller on good faith by agreeing to deal only on his representations. In all these and kindred cases there must be no false representations nor purposed concealments; all must be truly stated and fully disclosed. 'The vendor and vendee,' says Atkinson

on Marketable Titles, 134, 'in the absence of special circumstances, are to be considered as acting at arm's length. When the means of information as to the facts and circumstances affecting the value of the subject of sale are equally accessible to both parties, and neither of them does anything to impose on the other, the disclosure of any superior knowledge which one party may have over the other is not requisite to the validity of the contract.' *Id.*

"Illustrative of this is the celebrated case of *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. Ed. 214. The parties had been negotiating for the purchase of a quantity of tobacco. The buyer got private information of the conclusion of peace with Great Britain, and called very early in the morning following the receipt of it on the holders of the tobacco, and, ascertaining that they had received no intelligence of peace, purchased it at a great profit. The contract was contested for fraud and concealment. Chief Justice Marshall delivered the opinion of the court, to the effect that the buyer was not bound to communicate intelligence of extrinsic circumstances which might influence the price, though it were exclusively in his possession. And Chief Justice Gibson, in *Kintzing v. McElrath*, 5 Pa. 467, in commenting on this decision, says: 'It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.' See also, *Hershey v. Keembortz*, 6 Pa. 129. When the information is derived from strangers to the parties negotiating, and not affecting the quality or title of the thing negotiated for, it is not such as the opposite party can call for. We see no error in the rejection of the evidence on account of this part of the proposition, as there was no moral or legal obligation for the lessor to disclose any information he had on the subject of the intended improvement of the adjoining lot. It was not in the line of his title. It was derived from a stranger; it might be true or false; and the lessees could have got it by inquiry, as well as the lessor.

"It is well settled that there is no implied warranty that the premises are fit for the purposes for which they are rented, [citing authorities,] nor that they shall continue so, if there be no default on the part of the landlord."

In the recent case of *Viterbo v. Friedlander*, 120 U. S. 712, 7 Sup. Ct. 962, 30 L. Ed. 776, Mr. Justice Gray, who delivered the opinion of the court, said, in contrasting the doctrines of the common and civil law: "By that law (the common law, unlike the civil law) the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are leased."

The plaintiff's evidence failed wholly to show that there was any special and secret danger from snowslides which was known only to the railway company, and which could not have been ascertained by the plaintiff. It was, indeed, alleged that "the section house was in a place of danger from snowslides;" but this was plainly the danger that impended over any house placed, as this one necessarily was, on

a mountain side in a country subject to heavy falls of snow. The danger referred to was that incident to the region and the climate, and, in the eye of the law, as well known to the plaintiff as to the defendant.

On a careful reading of the plaintiff's evidence we are unable to see that the jury could have been permitted to find any positive act of negligence on the part of the railroad company, or any omission by it to disclose to the plaintiff any fact which it was the company's duty to disclose.

If, then, the plaintiff's case, as it appeared in her evidence, would not have justified a verdict on the ground of negligence or a fraudulent suppression of facts, and as the determination of the nature of the relation between the parties, as that of landlord and tenant, was clearly the function of the court, there would, in our opinion, have been no error if the court had really given a peremptory instruction to the jury to find for the defendant.

However, the record discloses that the court permitted the cases to go to the jury. It is true that the remarks made by the judge must have indicated to the jury that his own view was against the plaintiff's right to recover; but it has often been held by this court that it is not a reversible error in the judge to express his own opinion of the facts, if the rules of law are correctly laid down, and if the jury are given to understand that they are not bound by such opinion. *Baltimore & P. R. Co. v. Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185. 34 L. Ed. 784; *Simmons v. U. S.*, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968.

It is not necessary for us to review in detail the criticisms made in the several instructions, for, as we have seen, even if such instructions had amounted, in a legal effect, to a direction to find for the defendant, no error would have been committed.

It is obvious that these views of the case of Marcella Doyle, claiming for her personal injuries, are equally applicable to her suit, under the statute, for the loss of her children. The latter must be regarded as having entered under their mother's title, and not by reason of any invitation, express or implied, from the railway company; and hence they assumed a like risk, and are entitled to no other legal measure of redress.

No error being disclosed by these records, the judgment of the court below is in each case affirmed.

DALY v. WISE.

(Court of Appeals of New York, Second Division, 1892. 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 238.)

Appeal from common pleas of New York city and county, general term.

Action by Maria L. Daly against John S. Wise to recover rent. Plaintiff obtained judgment, which was affirmed by the general term. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by FOLLETT, C. J.:

September 27, 1888, the litigants entered into a written lease by which the plaintiff let to the defendant an unfurnished dwelling, known as "334 West Fifty-Eighth Street," in the city of New York, for one year from October 15, 1888, for \$1,800, payable \$150 October 15, 1888, and a like sum on the 15th day of each succeeding month. The lease contained no covenant in respect to the then condition of the house, nor that the lessor should put or keep it in repair. November 15, 1888, the defendant began to occupy the premises, paid the rent for four months, until January 15, 1889, and continued in occupation until February 2, 1889, when he abandoned them because of their unsanitary condition, arising from defective plumbing. February 4, 1890, this action was begun to recover the sums due by the terms of the lease on the 15th day of February, March, April, and May, 1889, \$600 in all, with interest.

The defendant answered that he was induced to enter into the lease by the oral representation of the plaintiff's agent "that the building on said premises was properly constructed and in thorough repair, the more especially in the matter of plumbing and sanitary arrangements; and that this defendant signed said lease, relying upon the faith of said representations so made as aforesaid." It was also alleged: "That, when defendant entered into possession of said premises, it was discovered that said representations were untrue, and that said premises were unfit for the purposes of a residence, in that there existed hidden defects in the plumbing and construction of the sewer and other pipes, and the sanitarian arrangements in the buildings thereon. That such defects were concealed from view, and were not discovered until the effect thereof became apparent in the health of the defendant's family. That by reason of said defects the said building became charged with sewer gas and other foul and poisonous odors, thereby causing the defendant, his wife, children, and servants, to become sick, and in great danger of death; and they so continued sick and in danger until the defendant was evicted from said premises, as hereinafter set out."

At the close of the evidence, neither party asked to have any question of fact submitted to the jury, but each moved that a verdict be directed in his or her favor. The defendant's motion was refused,

and he excepted; but the plaintiff's motion was granted, and the defendant again excepted. No other exceptions are contained in the record, and the only questions reviewable in this court are those presented by the two exceptions mentioned. A judgment was entered on the verdict for the plaintiff, which was affirmed at general term. No opinion was written, but the case was decided upon the opinion of the same court in another action, arising over the same lease. 7 N. Y. Supp. 902.

FOLLETT, C. J., (after stating the facts.) In case neither party requests to have any question of fact submitted to the jury, but each asks that a verdict be directed in his favor, the court is authorized to determine the fact in issue; and upon appeal the disputed facts are deemed to have been determined in favor of the party for whom the verdict is directed. *Kirtz v. Peck*, 113 N. Y. 222, 21 N. E. 130; *Dillon v. Cockroft*, 90 N. Y. 649; *Provost v. McEncroe*, 102 N. Y. 650, 5 N. E. 795. This case must be determined upon the theory that all the disputed facts have been found in favor of the plaintiff.

In case the whole of an unfurnished dwelling is leased for a definite term, under a single contract, which contains no covenant that the premises are in good repair, or that the lessor will put or keep them so, the law does not imply a covenant on the part of the lessor that the dwelling is without inherent defects, rendering it unfit for a residence. *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744. In *Smith v. Marrable*, 11 Mees. & W. 5, a contrary rule was laid down by Baron Parke. That case arose out of a contract to let a furnished dwelling for six weeks at eight guineas per week. The tenant moved in, but found the house so infested with bugs that it was uninhabitable, and at the end of the first week left, paying the rent for that week. In an action brought, it was held, in the opinion delivered by Baron Parke, concurred in by Barons Alderson and Gurney, "that if the demised premises are incumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them the tenant is at liberty to throw them up. This is not the case of a contract on the part of the landlord that the premises were free from this nuisance. It rather rests in an implied condition of law, that he undertakes to let them in a habitable state." Chief Baron Abinger concurred upon the ground that "a man who lets a ready-furnished house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited."

The opinion of Baron Parke was rested on the authority of *Edwards v. Etherington*, Ryan & M. 268, 7 Dowl. & R. 117, and *Collins v. Barrow*, 1 Moody & R. 112, both of which cases, together with *Salisbury v. Marshal*, 4 Car. & P. 65, are expressly overruled by *Hart v. Windsor*, 12 Mees. & W. 68, in which Parke, B., said: "We are under no necessity of deciding in the present case whether that of *Smith v. Marrable* be law or not. It is distinguishable from the pres-

ent case on the ground on which it was put by Lord Abinger, both on the argument of the case itself, but more fully in that of *Sutton v. Temple*, 12 Mees. & W. 52, for it was the case of a demise of a ready-furnished house for a temporary residence at a watering place. It was not a lease of real estate, merely. But that case certainly cannot be supported on the ground on which I rested my judgment." *Smith v. Marrable* was decided at Hilary term, 1843, and *Hart v. Windsor and Sutton v. Temple* at Michaelmas term of the same year. The rule laid down in *Smith v. Marrable* by Abinger, C. B., as applicable to furnished houses, has been followed in *Campbell v. Lord Wenlock*, 4 Fost. & F. 716, and *Wilson v. Hatton*, 2 Exch. Div. 336; but the rule as stated by Parke, B., has not been followed in England or in this state. *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744. The defendant cannot escape liability for rent on the ground that the law implied a covenant that the dwelling was fit for habitation.

Is the evidence contained in the record sufficient to have required the trial court to have held, as a matter of law, that the plaintiff fraudulently represented that the dwelling and its fixtures were in good condition, or that she fraudulently concealed from the plaintiff the fact that it was in an unsanitary condition? In case the owner of a dwelling knows that it has secret defects and conditions rendering it unfit for a residence, and fraudulently represents to one who becomes a tenant that the defects and conditions do not exist, or if he fraudulently conceals their existence from him, the lessee, if he abandons the house for such cause, will not be liable for subsequently accruing rent. *Wallace v. Lent*, 1 Daly, 481; *Jackson v. Odell*, 12 Daly, 345; *Rhineland v. Seaman*, 13 Abb. N. C. 455; *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164.

In the case at bar the defendant testified, and in this he was not contradicted, that, when he first went to the house with the plaintiff's agent, he said: "I complained to him [the agent] at the time that I thought some of the plumbing looked old. He said that Mrs. Daly was very stiff,—determined not to put in any new; that it was all in good condition; that they had fixed it as they thought it ought to be." This is the only representation which was made by the plaintiff or her agent in respect to the sanitary condition of the dwelling. It was not shown that the plaintiff or the agent knew that the representations were false, or that the plumbing was out of order, and fraudulently concealed the fact. This takes the case out of the rule above referred to, in respect to the owner's liability in case he fraudulently misrepresents the condition of the dwelling, or, knowing that it is in bad condition, fraudulently conceals the fact from the person who becomes the lessee.

Is the plaintiff liable for having stated that a material fact existed which did not exist, i. e., that the plumbing was in good order,

upon the theory that she was bound to know whether or not the statement was true? In case a party, for the purpose of inducing another to contract with him, states, on his personal knowledge, that a material fact does or does not exist, without having knowledge whether the statement is true or false, and without having reasonable grounds to believe it to be true, he is liable in fraud, if the statement is relied on, and is subsequently found to be false, although he had no actual knowledge of the untruth of the statement. *Bennett v. Judson*, 21 N. Y. 238; *Marsh v. Falker*, 40 N. Y. 562; *Oberlander v. Speiss*, 45 N. Y. 175; *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; 2 Pom. Eq. Jur. §§ 887, 888; *Story*, Eq. Jur. § 193. It does not appear that the plumbing had not been fixed as stated, nor that the statement that "it was all in good condition" was made without actual or supposed knowledge of its condition, nor that it was made in bad faith; and we think the case does not fall within the principle of the authorities last cited.

The defendant cannot escape liability on the ground that the statement of the agent amounted to a warranty, because it is not so pleaded in the answer. The judgment should be affirmed, with costs. All concur.⁴

INGALLS v. HOBBS.

(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 348, 31 N. E. 286, 16 L. R. A. 51, 32 Am. St. Rep. 460.)

Appeal from superior court, Suffolk county.

Action by Sarah P. Ingalls and others against Warren D. Hobbs to recover rent for a dwelling house. Defendant had judgment on an agreed statement of facts, and plaintiffs appeal. Affirmed.

KNOWLTON, J. This is an action to recover \$500 for the use and occupation of a furnished dwelling house at Swampscott during the summer of 1890. It was submitted to the superior court on what is entitled an "agreed statement of evidence," by which it appears

⁴ Where there is no fraud or concealment on the part of the lessor, the rule of caveat emptor applies as to the condition of the property at the time of the lease, in absence of any agreement by the lessor that the premises are suitable for occupation or for any other intended purpose. *Transfer Co. v. Malone*, 159 Ala. 325, 48 South. 705 (1909); *Bennett v. Sullivan*, 100 Me. 118, 60 Atl. 886 (1905); *Rand v. Adams*, 185 Mass. 341, 70 N. E. 445 (1904). Cf. *Hardman Estate v. McNair*, 61 Wash. 74, 111 Pac. 1059 (1910). In the case of *Hart v. Windsor*, 12 Mees. & W. 68, cited in the foregoing case, the house, according to the plea of the defendant, who had quit the premises and refused to pay rent, was "overrun with noxious, stinking, and nasty insects, called bugs." His plea was held no defense, however. Likewise in the case of *Foster v. Peyser*, 9 Cush. (Mass.) 242, 57 Am. Dec. 43 (1852), the tenant was held liable for rent although the conditions of the drains made the house unfit for habitation.

In Georgia, however, it is held to be the duty of a landlord to have a tenement on the day when the term begins in a condition reasonably suited for the purposes for which it is rented. *White v. Montgomery*, 58 Ga. 204 (1877); *Thompson v. Walker*, 6 Ga. App. 80, 64 S. E. 336 (1909).

that the defendant hired the premises of the plaintiffs for the season, as a furnished house, provided with beds, mattresses, matting, curtains, chairs, tables, kitchen utensils, and other articles which were apparently in good condition, and that when the defendant took possession it was found to be more or less infested with bugs, so that the defendant contended that it was unfit for habitation, and for that reason gave it up, and declined to occupy it. The agreed statement concludes as follows: "If, under the above circumstances, said house was not fit for occupation as a furnished house, and, being let as such, there was an implied agreement or warranty that the said house and furniture therein should be fit for use and occupation, judgment is to be for the defendant, with costs. If, however, under said circumstances, said house was fit for occupation as a furnished house, or there was no such implied agreement or warranty, judgment is to be for the plaintiffs in the sum of \$500, with interest from the date of the writ, and costs." Judgment was ordered for the defendant, and the plaintiffs appealed to this court.

The agreement of record shows that the facts were to be treated by the superior court as evidence from which inferences of fact might be drawn. The only "matter of law apparent on the record" which can be considered as an appeal in a case of this kind is the question whether the judgment is warranted by the evidence. Pub. St. c. 152, § 10; *Rand v. Hanson*, 154 Mass. 87, 28 N. E. 6, 12 L. R. A. 574, 26 Am. St. Rep. 210; *Mayhew v. Durfee*, 138 Mass. 584; *Railroad Co. v. Wilder*, 137 Mass. 536; *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708; *Fitzsimmons v. Carroll*, 128 Mass. 401; *Charlton v. Donnell*, 100 Mass. 229. The facts agreed warrant a finding that the house was unfit for habitation when it was hired, and we are therefore brought directly to the question whether there was an implied agreement on the part of the plaintiff that it was in a proper condition for immediate use as a dwelling house. It is well settled, both in this commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling house does not impliedly agree that it is fit for habitation. *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 45; *Foster v. Peyser*, 9 Cush. 242, 57 Am. Dec. 43; *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006; *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, Id. 68.

In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it for a term, however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the con-

tract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine caveat emptor, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time.

This distinction between furnished and unfurnished houses in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house let for a short time is in proper condition for immediate occupation as a dwelling. *Smith v. Marrable*, 11 Mees. & W. 5; *Wilson v. Hatton*, 2 Exch. Div. 336; *Warehouse Co. v. Carr*, 5 C. P. Div. 507; *Sutton v. Temple*, ubi supra; *Hart v. Windsor*, ubi supra; *Bird v. Lord Greville*, 1 Cababe & E. 317; *Charsley v. Jones*, 53 J. P. Q. B. 280. In *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 45, Chief Justice Shaw recognizes the doctrine as applicable to furnished houses; and in *Edwards v. McLean*, 122 N. Y. 302, 25 N. E. 483, *Smith v. Marrable*, and *Wilson v. Hatton*, cited above, are referred to with approval, although held inapplicable to the question then before the court. See *Cleves v. Willoughby*, 7 Hill (N. Y.) 83; *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744.

We are of opinion that in a lease of a completely furnished dwelling house for a single season at a summer watering place there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed. Judgment affirmed.⁵

⁵ As stated in the text, it is the English rule that in the letting of a furnished house, particularly for a brief period, there is an implied covenant that, at the time of the commencement of the term, it is in a state of fitness for habitation, and if it is not so, the tenant may rescind the contract at once. *Smith v. Marrable*, 11 Mees. & W. 5 (1843); *Wilson v. Finch Hatton*, 2 Ex. D. 336 (1877); *Harrison v. Malet*, 3 T. L. R. 58 (1886), where there were defects in drainage; *Bird v. Greville*, Cab. & El. 317 (1884), house not properly disinfected after recent infectious sickness; *Charsley v. Jones*, 53 J. P. 280 (1889). The rule is based upon the doctrine of the intention of the parties. Although the Massachusetts case of *Ingalls v. Hobbs*, supra, adopts the English rule, yet the weight of authority in this country would seem to be to the contrary. In *Murray v. Albertson*, 50 N. J. Law, 167, 13 Atl. 394, 7 Am. St. Rep. 787

2. INDEPENDENT OF COVENANTS

HAYNES v. ALDRICH.

(Court of Appeals of New York, 1892. 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636.)

Appeal from superior court, New York city, general term.

Action by Elizabeth J. Haynes against Elizabeth W. Aldrich. From a judgment of the general term, affirming a judgment for plaintiff, entered on a verdict directed by the trial judge, defendant appeals. Affirmed.

FINCH, J. Judgment was ordered against the defendant upon the trial of this action for rent accrued after the expiration of her original lease, upon the ground that by holding over after such expiration she became a tenant for another year upon the terms of the prior written lease. The facts disclosed were that such lease ended by its terms on May 1, 1889; that it contained a provision that the premises should be occupied as a private dwelling, and a covenant not to sublet without the written consent of the lessor. Both stipulations were violated. The tenant, without permission, rented the premises to Mrs. Coventry, who occupied them as a boarding house, and received as one of her boarders a lady, who was a chronic invalid, and continuously ill. On the 4th of February, 1889, the lessor inquired of the lessee whether she desired to renew her lease for another year, and was informed that she did not. The 1st day of May was a holiday, and doubtless the tenant had until noon of the next day for a surrender of possession. But the possession was retained by the tenant until the afternoon of May 4th, when the keys were tendered, but refused. The excuse given is that on the 2d day of May there was difficulty in engaging trucks, that the removal began on the 3d, but the sick boarder could not then be moved with safety, and was not moved until the 4th. This court held in *Commissioners v. Clark*, 33 N. Y. 251, that the rule is too well settled to be disputed that, where a tenant holds over after the expiration of his term, the law will imply an agreement to hold for a year upon the terms of the prior lease; that the option to so regard it is with the landlord, and not with the tenant; and that the latter holds over his term at his peril. In *Conway v. Starkweather*, 1 Denio, 114, the tenant had notified

(1887), the court reviews the English cases, and refuses to follow them. *Fisher v. Lighthall*, 4 Mackey (15 D. C.) 82, 54 Am. Rep. 258 (1885), likewise holds that there is no implied covenant that on the leasing of a furnished house that the premises are habitable. Compare, also, *Green v. Redding*, 92 Cal. 548, 28 Pac. 599 (1891); *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744 (1889); *Edwards v. McLean*, 122 N. Y. 302, 25 N. E. 483 (1890).

the landlord of his intention not to remain for another year, as was the fact in the present case, but nevertheless did hold over for a fortnight, and the fact of the notice was held to be immaterial, the court saying: "The act of the plaintiff in holding over has given the defendants a legal right to treat him as tenant, and it is not in his power to throw off that character, however onerous it may be."

The appellant does not deny the rule, but seeks to qualify it so as to mean that it is only where the tenant holds over voluntarily, and for his own convenience, that the landlord's right arises, and that it does not so arise when the tenant holds over involuntarily, not for his own convenience, but because he cannot help it. I am averse to any such qualification. It would introduce an uncertainty into a rule whose chief value lies in its certainty. The consequent confusion would be very great. Excuses would always be forthcoming, and their sufficiency be subject to the doubtful conclusions of a jury; and no lessor would ever know when he could safely promise possession to a new tenant. The cases cited by the appellant do not bear out his contention. In *Smith v. Allt*, 7 Daly, 492, the holding over was in part the act and assent of the landlord, and occasioned by pending negotiations, and could not have been said to be the sole act of the tenant. In *Shanahan v. Shanahan*, 55 N. Y. Super. Ct. 344, it appeared that the 1st of May was Sunday; that the tenant began to move on the afternoon of the 2d; that the removal continued during the 3d; and for that reason the tenant was held liable. The court did interject the remark that there was no unavoidable delay in moving, but without seeking to change or modify the rule. In *McCabe v. Evers*, 9 N. Y. Supp. 541, decided in 1890, in the New York city court, it appeared that the tenant moved out on the 1st of May, but left behind him an old stove and some rubbish, and tendered the key on the 2d of May. The court held that the evidence of a holding over was inconclusive and ambiguous, and the question should have been submitted to the jury. In *Manly v. Clemmens*, 14 N. Y. Supp. 366, decided by the same court, the term expired on February 2d at noon; the tenant began his removal in the morning, and worked till midnight. There was a verdict against the landlord, which the court refused to set aside. These cases, even if regarded in all respects as correctly decided, fall very far short of establishing the appellant's doctrine, or justifying a reversal in the present case.

There is no question here about the fact of a holding over, and no question, therefore, in that regard, for the solution of a jury. The tenant remained in possession voluntarily, for her own convenience and that of her sick boarder. If it was unsafe to remove the latter, the situation was wholly the fault of the tenant, who sets up as an excuse for one violation of the lessor's rights the consequences of her own earlier violation of the terms of the lease. No impossibility of removal was shown; merely difficulty and inconvenience, which

should have been and might have been foreseen and provided against. If the rule in this case seems to involve a hardship, that is sometimes true of every general rule, however just and wise, but does not justify its abrogation. To sustain this defense would open the door to a destruction of the settled doctrine, and tend to involve the rights of both lessor and lessee in uncertainty and confusion. I do not mean to say that whether there has been a holding over at all may not sometimes be so doubtful upon the facts as to require a submission to the jury. I mean to say that there is no such doubt in the present case. I reserve the question, also, whether there might not be an unavoidable delay in no manner the fault of the tenant, directly or indirectly, which would serve as a valid excuse. It is enough that here was a holding over not unavoidable, which might have been provided against, and where the chief difficulty grew directly out of the tenant's own wrongful act.

It is claimed, however, that the further question whether the lessor exercised the permitted option or took possession in her own right should have been submitted to the jury. I think the facts admit of but one inference. The lessor did exercise her option, and that promptly and clearly. When the keys were tendered to her mother they were refused. In the afternoon of May 4th the lessor went to the house, to see what was occurring. She found it deserted, and the windows open. Her property needed protection. Under the lease she had a right to enter and relet it as the agent of the tenant. A policeman entered through the open window. Some keys were found on the mantel, and thereafter used, but evidently not all, for others were restored much later. The premises were somewhat damaged, and the lessor had a little painting and some plumbing done, amounting only to ordinary and needed repairs. She tried to rent the house, but failed, and went to Europe during the summer, and occupied the house in the fall, under a stipulation which expressly reserved her existing rights. Upon these facts no inference was justified except that drawn by the court. There was a clear refusal to accept the surrender offered, and the repairs were consistent with that position, and with the right reserved in the lease. We think the judgment was correct, and should be affirmed, with costs. All concur.

DAVIS v. WILLIAMS.

(Supreme Court of Alabama, 1901. 130 Ala. 530, 30 South. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55.)

Appeal from chancery court, Macon county; W. L. Parks, Chancellor.

The bill was filed to compel the specific performance of a contract which was made by R. T. Davis and Mary C. Davis with the Georgia & Alabama Construction Company, by which contract R. T. Davis

and Mary C. Davis, his wife, agreed, upon certain conditions, to convey to the Georgia & Alabama Construction Company one-half interest in 40 acres of land in Macon county. The conditions of this contract, as stated in the opinion, were fulfilled, and the contract was assigned by the Georgia & Alabama Construction Company to the complainants. After the execution of the contract R. T. Davis died, and the title to the lands vested in his wife, Mary C. Davis, and Hubert T. Davis and Fort Davis, his children, who survived him. Mary C. Davis purchased the interest of Fort Davis, and at the time of the filing of the present bill she and Hubert T. Davis owned the lands as tenants in common. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. On the submission of the cause on the pleadings and proof the chancellor rendered a decree granting the relief prayed for, and directed the defendants to execute and deliver to the complainants a deed to a one-half interest in the lands in dispute.

TYSON, J. The bill in this case was filed by complainants, as owners of a certain contract by assignment, against the respondents, as successors in interest and title to the lands agreed to be conveyed, and seeks a specific performance of that contract. The contract was executed by R. T. Davis and Mary C. Davis, his wife, in which they agreed to convey by warranty deed a half interest in 40 acres of land, to be selected by the complainants' assignors, in a certain section owned by R. T. Davis. The consideration of this contract was that the complainants' assignors were to build the Savannah, Americus & Montgomery Railroad within one-half mile of the residence of the Davises, and to erect a depot within the same distance from their residence, at any point along the line of the road most suitable to themselves. The deed was to be executed as soon as the road was built, the depot established, and a train made a trip to Montgomery. The land agreed to be conveyed upon compliance with the conditions of the contract, and selected, was a part of a tract of land owned by him, comprising about 800 acres. R. T. Davis died shortly after entering into the contract, and after the selection of the land was made by complainants' assignors under it. He left surviving him his wife and two sons. His wife, who is one of the respondents, was at the date of the filing of the bill the owner of a two-thirds undivided interest in the entire tract; and Hubert T. Davis, a son, the other respondent, was the owner of the remainder. The evidence shows without dispute that the road was built, the depot established, a train ran through to Montgomery, and the land selected during the year 1891. In other words, complainants' assignors had performed their obligation under the contract, and were entitled to a deed from the respondents during the year 1891. On April 20, 1896, the com-

plainants by purchase became the owners of this contract, and by virtue of that ownership were entitled to a deed from the respondents.

One of the defenses invoked by the answer of the respondents is that complainant Williams for a period of about two years before the filing of this bill, at the date of its filing, and for one year subsequent thereto, tenanted and dwelt on a part of the lands in controversy. It appears from the evidence that Williams in 1892 built a house for the respondents upon the land in controversy, which he occupied while "looking after the business" for them, until December, 1896, from which last-named date he paid rent for this house at the rate of five dollars per month for one year, and four dollars per month for eight months, ceasing to pay rent in August, 1898. The bill was filed on the 11th of February, 1897. It will be noted that when this bill was filed, and after the complainant Williams had become the owner of the contract, and after he became entitled to a deed to the lands from the respondents, he rented a part of the lands, and became the tenant of one of the respondents. His occupancy of the house which is situated upon the lands in controversy, for looking after the business of the respondents, prior to December 2, 1896, when he commenced to pay rent therefor, did not create the relation of landlord and tenant. That relation was simply that of employer and employé or master and servant, and the occupancy of the house was a part merely of the contract for service, and operated as a portion of the consideration of that agreement. *People v. Annis*, 45 Barb. (N. Y.) 304; *Wilber v. Sisson*, 53 Barb. (N. Y.) 258; *Haywood v. Miller*, 3 Hill (N. Y.) 90; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *Doyle v. Gibbs*, 6 Lans. (N. Y.) 180; *Bowman v. Bradley*, 151 Pa. 351, 24 Atl. 1062, 17 L. R. A. 213; *McQuade v. Emmons*, 38 N. J. Law, 397; *School Dist. v. Batsche*, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576; *East Norway Lake Church v. Froislie*, 37 Minn. 447, 35 N. W. 260; *White v. Bayley*, 10 C. B. (N. S.) 227.

The relation of landlord and tenant arose in December, 1896, which, as we have shown, was after Williams became entitled to a deed from the respondents to the land. We have the question presented as to whether Williams, being the tenant of one of the respondents at the time of the filing of the bill, and being the owner of the contract at the time he entered into that relation, can maintain the bill to require a specific performance of that contract. There is not an intimation that there was any understanding or agreement that his rental contract was subject to his right to have the contract of purchase of which he was part owner enforced, or that his landlord ever at any time in any way recognized his rights under that contract, or obligation under it to make a deed to him. It is a principle universally recognized and enforced by courts of law that a tenant is estopped to dispute the title of his landlord, unless his landlord's title has expired or been extinguished, either by operation of law or his own act, after

the creation of the tenancy. It is only when there is a change in the condition of the landlord's title for the worse after the tenant enters into his contract, in the absence of fraud or mistake of fact, that he is permitted to show the change in the condition of the title. Under no circumstances, when there is no fraud or mistake of fact, will it be permitted to deny the title of the landlord at the beginning of his term. This doctrine has been enforced by this court from its earliest history. *Randolph v. Carlton*, 8 Ala. 606; *Pope v. Harkins*, 16 Ala. 321; *Rogers v. Boynton*, 57 Ala. 501; *Farris v. Houston*, 74 Ala. 162; *Robinson v. Holt*, 90 Ala. 115, 7 South. 441; *Barlow v. Dahm*, 97 Ala. 415, 12 South. 293, 38 Am. St. Rep. 192; *Pugh v. Davis*, 103 Ala. 316, 18 South. 8, 49 Am. St. Rep. 30.

In 2 *McAdam, Landl. & T.* p. 1341 et seq., this doctrine is stated in this language: "For reasons of public policy a tenant is never allowed to dispute his landlord's title after having accepted possession under him. This rule is elementary. The estoppel extends equally to landlord and tenant, so that, while the tenant is estopped from denying the landlord's title, the landlord cannot allege that he had no title at the time of the demise. Where a tenant enters into possession under a lease, he is estopped from denying the title of his landlord. The tenant must surrender the possession to the landlord before he can assail or question the title under which he entered. * * * 'He can no more show that the premises belonged to the state than he can that they belonged to himself. He must first restore the possession which he obtained from his landlord, and then, as plaintiff, he may avail himself of any title which he has been or may be able to acquire.' 'The foundation of the estoppel is the fact of the one obtaining possession and enjoying possession by the permission of the other. And so long as one has this enjoyment he is prevented by this rule of law from turning round and saying his landlord has no right or title to keep him in possession.' * * * No dispute as to the title will be tolerated until the parties are placed in their original position. * * * Nor can he be heard to deny the title of his landlord, nor can he rid himself of such relation, without a complete surrender of the possession of the land. To allow him to agree and profess to hold possession under one as landlord, and at the same time to hold covertly for himself, or for another's advantage, would be to encourage and uphold a gross fraud, which the law will never do." Continuing, the author says: "He must first surrender up the premises to his landlord before assuming an attitude of hostility to the title or claim of title of the latter."

It may be urged that this proceeding is in equity, and that the suit involves no denial by Williams of his landlord's title. We apprehend that it is of no consequence in what court this question of estoppel may arise. If it exists, there is no reason why it should not be enforced by courts of equity as well as by courts of law.

Indeed, such a distinction has never been asserted or recognized. In the case of *Barlow v. Dahm*, 97 Ala. 414, 12 South. 293, 38 Am. St. Rep. 192, which was a bill for sale of land for partition by a tenant against his landlord, it was held that the tenant could not maintain the bill without first surrendering the possession. And in *Davis v. Pou*, 108 Ala. 443, 19 South. 362, which was a bill by a tenant to enjoin a writ of possession and execution at law issued upon a judgment in unlawful detainer in favor of his landlord, it was held that there was no equity in the bill, for the reason that the tenant could not be permitted to show that his landlord's title had terminated before the beginning of the tenancy. In *Homan v. Moore*, 4 Price, 5, it was held: "A lessee proceeded against by ejectment, and who has received notice from a claimant disputing his landlord's title not to pay him any more rent, and has been threatened with distress by his landlord if he does not, cannot sustain an injunction in equity to restrain either the ejectment or distress, for he is not permitted by such means to bring his landlord's title into dispute." In *Smith v. Target*, 2 Anstr. 529, it was held that a tenant, though threatened with suits at law on a title adverse to his landlord's, cannot make them interplead. Said the court: "It would be extremely mischievous if he were allowed, in his own right, or that of others, to call in question the title of the person under whom he holds." To the same effect is *Johnson v. Atkinson*, 3 Anstr. 798. In these cases the tenant entered upon his lease after the termination of his landlord's title. The exception, however, was recognized by the chancery courts of England, as exists in courts of law, that, where the landlord has by his own act given title to another subsequent to the lease, he may thereby entangle the tenant in embarrassment, which a bill of interpleader may be the most proper mode of quieting. *Cowtan v. Williams*, 9 Ves. 107; *Clarke v. Byne*, 13 Ves. 386.

This brings us to a consideration of the question as to whether the assertion by the complainant Williams of his right to have his contract of purchase specifically enforced involves a denial of his landlord's title. At the threshold of the discussion of this question it is necessary to ascertain the relation of the complainants to the respondents with respect to the interest in the lands and in the contract of sale involved in this controversy. That it is a contract of sale, and establishes the relation of vendor and vendee between the parties, does not admit of disputation. Assuming this as true, "in law the contract is wholly, in every particular, executory, and produces no effect upon the respective estates and titles of the parties. The vendor remains to all intents the owner of the land. He can convey it free from any legal claim or incumbrance. He can devise it. On his death intestate it descends to his heirs. The contract in no manner interferes with his legal right to and estate in the land, and he is simply subjected to the legal duty of performing the contract, or

paying such damages as a jury should award. On the other hand, the vendee acquires no interest whatever in the land. His right is a mere thing in action, and his duty is a debt—an obligation—to pay the price; and on his death both this right and this duty pass to his personal representatives, and not to his heirs. In short, he obtains at law no real property or interest in real property. The relations between the two parties are wholly personal. No change is made until by the execution and delivery of a deed of conveyance the estate in the land passes to the vendee. Equity views all these relations from a very different standpoint. In some respects, for some purposes, the contract is executory in equity as well as at law; but, so far as the interest or estate in the land of the two parties is concerned, it is regarded as executed, and as operating to transfer the estate from the vendor and to vest it in the vendee. This theory must of necessity make a great difference in the respective rights, duties, and relations of the vendor and vendee. One of the grand principles of equity—one of the great foundation stones upon which the whole superstructure of particular doctrines and rules is erected—is the proposition: Equity regards and treats as done what in good conscience ought to be done. This principle, so brief in its statement, is most broad in its application and fruitful in its results. From it, as the root, spring a large part of the rules which make up the body of equitable jurisprudence. Apply the principle to the present case. By the terms of the contract, the land ought to be conveyed to the vendee, and the purchase money ought to be transferred to the vendor. Equity therefore regards these as done,—the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as owner of the land. An equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years. Although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee, to whom all the beneficial interest has passed." *Pom. Cont.* § 314. See, also, *Ashurst v. Peck*, 101 Ala. 499, 14 South. 541.

The foregoing extract clearly defines and fixes the status of Williams and one of the respondents after he became part owner of the contract, which status necessarily existed at the time of the filing of the bill, and continued up to the present time. It is only upon the theory of the existence of this status that he can have relief upon the bill, and, of necessity, the prosecution of the suit for the specific performance of the contract is an assertion by him that at the time of the filing of the bill he was the owner of the land. This assertion he cannot be permitted to make until he surrenders up the premises to his landlord, since it puts him in a position of repudiating or of ridding himself of the relation of tenant, which he bore to one of the respondents when the bill was filed, or of assuming an attitude

of hostility to the title or claim of title of his landlord. "A landlord can only be required to litigate title with the tenant upon the vantage ground of possession." *Barlow v. Dahm*, supra. Surely it will not be controverted that the bill involves a litigation of title between Williams, the tenant, and Mrs. Davis, his landlord. For, as we have said, Williams asserts by the bill his ownership of the land, which is denied by the respondent Mrs. Davis.

It is argued, on the authority of *Bogan v. Daughdrill*, 51 Ala. 312, that this court can correct the decree of the lower court, and grant relief to complainants, if entitled to it, for the portion of the land not in the possession of Williams, at the date of the filing of the bill, as tenant. Assuming that complainants are entitled to that relief, without deciding it, the record furnishes no sufficient data upon which to predicate such a decree. It fails to disclose with any degree of accuracy the area of the parcel in the possession of Williams. To undertake to eliminate it out of the land, and to render a decree requiring the respondents to execute a deed for the balance, would, at best, be but a conjecture as to the area or boundaries of the land decreed to be conveyed. The ownership of the contract being joint, and the enforcement of it being sought jointly, the familiar doctrine that both complainants must be entitled to relief, or neither can have it, applies. Williams not being entitled to relief, the bill must be dismissed. *Wilkins v. Judge*, 14 Ala. 135; *Moore v. Moore*, 17 Ala. 631; *Tucker v. Holley*, 20 Ala. 426; *Plunkett v. Kelly*, 22 Ala. 655; *Plant v. Voegelin*, 30 Ala. 160; *Vaughn v. Lovejoy*, 34 Ala. 437; *James v. James*, 55 Ala. 525; *Larkin v. Mason*, 71 Ala. 231; 3 Brick. Dig. 373, § 87.

This dismissal will not preclude the rights of complainants to file another bill, if they are so advised. Reversed and rendered.

SARPE and DOWDELL, JJ., dissent.

III. Termination of Estates for Years *

1. DESTRUCTION OF PREMISES

GAY v. DAVEY.

(Supreme Court of Ohio, 1890. 47 Ohio St. 396, 25 N. E. 425.)

Error to district court, Hamilton county.

DICKMAN, J. On the 7th day of July, A. D. 1879, James P. Gay leased to John R. Davey and A. B. Allen, the defendants in error, certain premises in the city of Cincinnati for the term of three years from that day, the lessees to have the privilege of a further term of

* For discussion of principles, see *Burdick*, Real Prop. § 82.

two years, commencing with the 7th day of July, 1882. The premises, used for manufacturing purposes, are described as situated in the city of Cincinnati, being three rooms on the front of the first, second, and third floors of James P. Gay's main building fronting on the north side of New street, and the room in the third story of the addition to the main building; also a strip of ground lying on the west side of the main building, being 12 feet in width on the north side of New street, and running back the same width to the building described as the addition to the main building, the lessor to erect a one-story brick office 12 feet by 16 feet adjoining the southwest corner of the building on New street, for occupancy by the lessees. As rent, the lessees were to pay during the term of three years the sum of \$125 per month, payable monthly, commencing on the 7th day of August, 1879, and on the 7th day of each and every month thereafter during such term. The entire building, including the apartments leased to Davey and Allen, was destroyed by fire on the 11th day of December, 1880, but was rebuilt by the lessor, and was ready for occupancy in the early part of January, 1881.

When the building was restored, the lessees declined to pay rent from the time of restoration, and the lessor commenced suit in the superior court of Cincinnati to recover the rent from January 7, 1881, to May 7, 1881. The lessees set up in defense that, by the terms and provisions of the lease under which they had occupied the premises, it was stipulated that, if the occupied premises were destroyed or rendered untenable by fire or unavoidable accident, they were not to be required to pay any rent thereafter; that the premises were totally destroyed on the 11th day of December, 1880; that they did not use, occupy, or enjoy the premises at any time thereafter; that the premises were destroyed without any default or neglect on their part; and that the lessees thereupon surrendered possession of the premises to the lessor. The lessor, in reply, denied that the premises included in the lease were totally destroyed by fire, and alleged that there was only a partial destruction of the same, the brick office not being materially injured, and continuing tenable; and further denied that the premises were ever surrendered to the lessor by the lessees. The lease contained the covenant "that said lessees will pay said rents, in manner aforesaid, except said premises shall be destroyed or rendered untenable by fire or unavoidable accident." Before the trial, the death of the plaintiff was suggested, and it was ordered that the action be revived in the name of Sarah E. Gay, the plaintiff in error, as executrix of the last will and testament of James P. Gay, deceased. On the trial, a jury being waived, the court, upon the testimony, found in favor of the plaintiff, and entered judgment for the amount claimed, with interest and costs. The defendants thereupon filed their motion to set aside the judgment, and for a new trial, mainly on the ground that the finding of the court was against

the weight of the evidence, which motion the court overruled. The defendants excepted, and by bill of exceptions placed all the testimony on the record. The defendants, on petition in error in the district court, assigned for error that the judgment rendered by the superior court was against the weight of the evidence, and that the superior court erred in overruling their motion for a new trial. The district court reversed the judgment of the superior court, and, proceeding to render such judgment as it considered that court should have rendered, rendered a final judgment for the lessees, John R. Davey and A. B. Allen, and dismissed the action of Sarah E. Gale, executrix.

By this proceeding, it is sought to reverse the judgment of reversal, as also the final judgment rendered by the district court. Material facts necessary to sustain a judgment were in issue between the parties. The main ground upon which the defendants predicated their motion to set aside the judgment, and for a new trial, was that the finding of the court was against the weight of the evidence. When the reviewing court reversed the judgment of the court below for error in overruling such motion, the only judgment which should have been rendered after reversal was to grant a new trial, as moved for in the trial court. The case in the district court was not one for a final judgment. The lessees were not entitled to judgment on the pleadings. There was no agreed statement of facts, and no finding of facts by the court to which the case had been submitted on the evidence; and it was a case in which the right existed to demand a jury. For aught appearing to the contrary, upon remanding the case for further proceedings, any unavoidable defect in the evidence, on the hearing before the court, might, in furtherance of justice, have been supplied in a second trial. We are of the opinion therefore that, in reversing the judgment of the superior court, the district court erred in rendering final judgment for the lessees Davey and Allen, instead of remanding the case for a new trial. See *Emery's Sons v. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Miller v. Sullivan*, 26 Ohio St. 639; *Stivers v. Borden*, 20 Ohio St. 232.

In remanding the cause for further proceedings, there are legal principles that claim consideration. Where the tenant, who expressly covenants to pay rent, has not protected himself by a saving clause in the lease, the proposition is generally true that he will be bound to continue the payment of rent after the destruction of the tenement by fire or unavoidable accident, and will have no relief against such express covenant. Having by his own contract created a duty or charge upon himself, he will be bound to make it good, notwithstanding any accident or inevitable necessity, because against such casualty he might have provided by his own contract, if he had thought proper to do so. *Linn v. Ross*, 10 Ohio, 412, 36 Am. Dec. 95. But under the facts, as it is claimed they exist, the defendants in error insist that

they are discharged from the payment of rent by the stipulation in the lease that if the premises occupied by them should be destroyed, or made untenable by fire or unavoidable accident, they were not thereafter to be required to pay rent. If the lease had contained a covenant on the part of the lessor to rebuild the premises if destroyed, and he had rebuilt in accordance with his covenant, the stipulation would not discharge the lessees from liability to pay rent. But the lessor was under no obligation to rebuild, and the rights of his tenants secured by stipulation in the lease, and accruing immediately upon the destruction of the premises by fire, were not to be kept in abeyance by the contingency of the lessor's concluding to rebuild. If, however, after the building was burned, the owner was requested and induced by the lessees to rebuild for the lessees' use and occupation, they could not justly avoid the payment of rent, after the building had been restored to its former condition.

Furthermore, it is contended in behalf of the defendants in error that they are relieved from the payment of rent under section 4113 of the Revised Statutes. That section reads as follows: "The lessee of any building which, without any fault or neglect on his part, is destroyed or so injured by the elements, or other cause, as to be unfit for occupancy, shall not be liable to pay rent to the lessor or owner thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessee shall thereupon surrender possession of the premises so leased." The obvious design of this statutory provision is to relieve from hardship the tenant who has inadvertently neglected to protect himself by express covenant in his lease against the necessity of paying rent after the leased premises have been destroyed by fire or other casualty. But, to secure the benefit of the statute, the tenant must surrender or yield up all that remains of the premises embraced in the lease without any purpose or intention of resuming possession thereof. The legislature has absolved the tenant from an onerous obligation, but the burden is removed only upon his compliance with the statutory condition. The statute, in case the buildings are destroyed, does not clothe the landlord with the power of terminating the lease, and if the tenant alone is to have the option of so doing, and may be discharged from the obligation to pay rent, he must give up the possession and control of the premises to him who is entitled to the reversion. If he would preserve the lease in full force, and avail himself of its advantages, he must also bear any incidental hardship that may arise during its continuance. The clause in the statute for surrendering possession of the premises would be without significance, if not construed as qualifying the provision for a release of the tenant from the payment of rent. In *Johnson v. Oppenheim*, 55 N. Y. 280, the court of appeals, in construing chapter 345 of the New York Laws of 1860, which is substantially the same as the statute of Ohio, in *pari materia*, say:

"The act provides that, upon the destruction or injury of leasehold buildings so that the same are untenable, the tenant shall not be liable or bound to pay rent, and that he may thereupon quit and surrender the possession of the premises. The tenancy is not made absolutely to cease, except at the option of the tenant. He is relieved from his obligation, if he chooses to avail himself of the provisions of the act, or he may perform the covenants of his lease and retain the benefit of it; but he cannot have the benefit of the law, and at the same time repudiate its obligations. If he elects absolution from its obligations, the act, by necessary implication, imposes as a condition the surrender of the premises." Such is manifestly the correct interpretation of the statute.

But it is contended the rule is well settled that, in the absence of covenant, when the subject-matter of the demise is destroyed by fire or other casualty—as a house, where the land on which it rests is not rented, or apartments in the house, whether for purposes of trade or otherwise—the destruction of the building terminates the relation of landlord and tenant, and there is nothing left to surrender to the owner or lessor. While this may be a correct statement of the general principle, the contract of lease in the case at bar was entire, and embraced, not only the rooms in the destroyed building, but also the one-story brick office, and the strip of ground lying on the west side of the main building. If, therefore, the building was totally destroyed by fire, and a surrender of the leased rooms became impossible, it could not be so said of the office and strip of ground, if the lessees, after the fire, continued to use and occupy the same until the building was restored and ready for occupancy. As to those portions of the demised premises that were not destroyed, and remained tenantable, there was no apparent obstacle in the way of a surrender as contemplated in the statute.

The final judgment in favor of Davey and Allen should be reversed, and cause remanded. Judgment accordingly.⁷

⁷ It is well established by the decisions that, at common law, where a tenant of premises accidentally destroyed has expressly covenanted to pay rent, he is not relieved from his duty to pay in absence of an express covenant or agreement to that effect. *Cook v. Anderson*, 85 Ala. 99, 4 South. 713 (1887). Compare, however, *O'Byrne v. Henley*, 161 Ala. 620, 50 South. 83, 23 L. R. A. (N. S.) 496 (1909); *Mayer v. Morehead*, 106 Ga. 434, 32 S. E. 349 (1898); *Bowen v. Clemens*, 161 Mich. 493, 126 N. W. 639, 137 Am. St. Rep. 521 (1910); *Viterbo v. Friedlander*, 120 U. S. 707, 7 Sup. Ct. 962, 30 L. Ed. 778 (1887). Where, however, there is a destruction of the entire subject-matter, as in case of a room or an apartment, with no interest in the land, many of the cases make an exception to the general rule governing the tenant's liability. See *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654 (1868); *Alnsworth v. Ritt*, 38 Cal. 89 (1869); *Humiston v. Wheeler*, 175 Ill. 514, 51 N. E. 893 (1898); *Harrington v. Watson*, 11 Or. 143, 3 Pac. 173, 50 Am. Rep. 465 (1883).

*(B) Tenancies at Will, from Year to Year, and at Sufferance***I. Tenancies at Will—Creation ***

HUNTER v. FROST.

(Supreme Court of Minnesota, 1891. 47 Minn. 1, 49 N. W. 327.)

Appeal from district court, Ramsey county; Egan, Judge.

MITCHELL, J. The plaintiff leased to defendant a tenement for the term of 13 months from April 1, 1888, for an agreed rent of \$540 per annum, payable in equal installments of \$45, in advance, on the first day of each month. The defendant entered and occupied the premises during the term, and after its expiration held over and continued in possession, and paid rent to the plaintiff, in accordance with the terms of the lease up to and including the month of November, 1889. Several days prior to October 30, 1889, the defendant served upon plaintiff written notice that he would vacate the premises on November 30th next ensuing. In pursuance of this notice he vacated them, and has not since that time occupied them or paid rent. This action is to recover rent from December 1, 1889, to May 1, 1890.

It is not questioned but that at common law the defendant, by holding over after the end of the term without any new agreement, and paying rent according to the terms of the prior tenancy, which was accepted by the plaintiff, became a tenant from year to year, and that this tenancy could not be terminated by either party, except upon due notice, (at common law, six months,) terminating at the end of the first or any subsequent year, (May 1st.) But defendant's contention is that tenancies from year to year have been abolished by the statutes of this state, and converted into tenancies at will, which may be terminated at any time by either party by giving the length of notice provided by Gen. St. 1878, c. 75, § 40, which, in this case, would be one month, the rent reserved being payable monthly. While tenancies from year to year are the creation of judicial decisions, based upon principles of policy and justice, out of what were anciently tenancies strictly at will, terminable at any time by either party without notice, yet such tenancies had become so well established and so fully recognized in the common law that it would naturally be supposed that, if it had been intended to convert them into mere tenancies at will, it would have been done by express and clear language, and not left to mere inference or implication. We think we are safe in saying that, although our statutes bearing upon the subject have always been the same as now, it has never been the understanding of the bar of the state that they had introduced any such radical change in the law as that now contended for. Evidently

* For discussion of principles, see Burdick, Real Prop. §§ 83-86.

this court, in considering the cases of *Gardner v. Commissioners*, 21 Minn. 38, and *Dayton v. Craik*, 26 Minn. 134, 1 N. W. 813, assumed that tenancies from year to year still existed in this state. It was squarely so decided in *Smith v. Bell*, 44 Minn. 524, 47 N. W. 263, although the question was not very fully argued in that case, and we would not feel bound to follow it if fully convinced that it was wrong.

Counsel for defendant does not claim that there is any express provision of statute abolishing such tenancies, but he relies on certain provisions which he claims effect that result by implication. The first is Gen. St. c. 45, § 1, dividing estates in land into estates of inheritance, estates for life, estates for years, estates at will and by sufferance; the argument being that, as estates from year to year are not named, therefore they are impliedly abolished. The next is Gen. St. c. 75, § 40, which provides that all estates at will may be determined by either party by three months' notice in writing for that purpose given to the other party, and, when the rent reserved is payable at periods of less than three months, the term of such notice shall be sufficient if it is equal to the interval between the times of payment. It is argued that by this the legislature intended to provide for the termination of all estates which did not terminate themselves without notice, and made provision for all the estates, which it recognized, which did not terminate themselves, to-wit, estates at will. Reference is also made to Gen. St. c. 84, § 11, governing summary proceedings for the recovery of possession by a landlord. It is said that this was evidently intended to give a landlord a summary remedy whenever the relation of landlord exists, but, as the statute only refers to two classes of cases in which the remedy may be employed, when the tenant is not in arrears of rent, to-wit, when the tenant holds over after the termination of the time for which the premises were demised, and where a tenant at will holds over after the determination of any such estate by notice to quit, therefore, if tenancies from year to year still exist, the tenant in such cases could only be evicted by an action of ejectment.

It seems to us that counsel has been led into error by failing to duly consider the state of the common law when the statutes were passed, and by assuming that, when they speak of tenancies at will, they refer exclusively to tenancies strictly at will; that is, those which, but for the statute in reference to notices to quit, would have been terminable at any time by either party without notice. It was determined very anciently by the common law, upon principles of justice and policy, that estates at will were equally at the will of both parties, and neither of them was permitted to exercise his will in a wanton manner, and contrary to equity and good faith, but that they could only be terminated by notice for a longer or shorter period, depending usually upon the nature of the original demise. At first there was no other rule but that the notice should be a reasonable one. Because of the uncertainty of this rule, the courts early adopted, as far as possible, some fixed period as being reasonable. In those tenancies which, from the nature

of the original demise, they construed to be tenancies from year to year, the courts adopted six months as a reasonable notice, holding that such tenancies could only be determined by a notice of at least six months, terminating at the expiration of the first or any succeeding year. And in those cases which did not come within the class of tenancies from year to year, because by implication for some definite period less than a year, the rule was generally adopted that the time of notice should be governed by the length of time specified as the interval between the times of payment of rent, and should be equal to one of these intervals, and must end at the expiration thereof. The result was that at common law estates at will, in the strict sense, became almost extinguished at a very early date, under the operation of judicial decisions. Indeed, it would have been difficult to conceive of an instance of such a tenancy, except where created by the express contract of the parties to that effect. But they still remained substantially tenancies at will, except that such will could not be determined by either party without due notice to quit.

The enumeration or classification of estates adopted by our statutes is but declaratory of that found in all writers on the common law, even after the doctrine of tenancies from year to year had been fully established by the decisions of the courts. Estates in land, less than freehold, have always been classified as of three sorts: (1) Estates for years; (2) estates at will; (3) estates by sufferance. 2 Bl. Comm. 139. This classification was first incorporated in statutory form in the old Revised Statutes of New York, and from them borrowed successively by Michigan and Wisconsin, and perhaps other states; but in none of them was it ever held, or even suggested, that the statute affected or in any way changed the common law as to tenancies from year to year. Did the statutory enumeration necessarily exclude tenancies from year to year, there would be much force in defendant's argument. But, so far from this being the case, they may be included in either estates for years or estates at will, or both, as they possess many of the qualities of each. A tenancy from year to year, though indeterminate as to duration until notice given, has most of the qualities and incidents of a term for years, and, when notice has been given, the term is as much fixed for a definite period as any term for years. A tenant from year to year has a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract, and parcel of it. Such an estate is not determined by the death of either lessor or lessee; it is assignable and demisable, and may be pleaded as a term. But, although it has many of the qualities of a term for years, yet it is, as already remarked, substantially a tenancy at will except that such will cannot be determined by either party without due notice to quit, terminating at the end of a year. 1 Woodf. Landl. & Ten. 219. For purposes of notice to quit, it is a general tenancy at will. 2 Tayl. Landl. & Ten. § 467, and cases cited. And for purposes of general

classification it is treated as a species of tenancy at will, and as properly so as are those tenancies which by implication are held to be for some period less than a year, as from quarter to quarter, or from month to month, where notice to quit is also necessary in order to terminate them; the only difference being as to the length of the notice and the time it should terminate.

Notwithstanding what was decided in *Smith v. Bell*, supra, we have come to the conclusion, upon fuller examination, that the provisions of chapter 75, § 40, in relation to notices to quit, were intended to apply to all estates which do not terminate themselves without notice, and that for the purposes of such notices a tenancy from year to year is a tenancy at will. In some of the cases cited by plaintiff it was held, as in *Smith v. Bell*, that similar statutes apply only to the notice required to terminate a tenancy at will, and have no application to a tenancy from year to year. In one of these cases it is said that the purpose of the statute was to give tenants at will the right to the notice therein specified before they could be dispossessed, whereas, before such enactment, they were not entitled to any notice whatever; in other words, that the statute was to give the tenant the right to notice in cases which, but for the statute, would have been tenancies strictly at will. It seems to us that, in placing this construction upon such statutes, the courts have entirely overlooked the fact that tenancies strictly at will had already practically ceased to exist, except where the parties had expressly contracted that the tenancy might be terminated at any time without notice; and as in such cases the contract of the parties, and not the statute, would control, the result would be that such a construction would render the statute meaningless.

We have therefore reached the conclusion that the description of estate commonly known as a "tenancy from year to year" is comprehended in the term "estates at will," as used in chapter 75, § 40. But this section has reference only to the length of notice, and does not assume to otherwise change or affect the nature of the tenancy, or the existing rules of law as to when the notice should terminate. For example, where, by implication, the tenancy is from quarter to quarter or from month to month, the rent being payable quarterly or monthly, the notice must still terminate with the quarter or month; and, where the tenancy is from year to year, the notice must terminate with a year, although the length of it may now be shorter than six months, as formerly required at common law. Consequently, while the notice given by defendant in this case was sufficient as to length, yet it was wholly ineffectual, because not terminating at the end of a year.

There is nothing in the point that there can be no such thing as a tenancy from year to year in this state because of the statute of frauds. Gen. St. c. 41, § 10. The courts have uniformly held that tenancies from year to year were not affected by such a statute. The cases from Massachusetts and Maine are not in point, because expressly placed

upon their statutes providing that an estate or interest in land, created without an instrument in writing, "shall have the force and effect of an estate at will only." Judgment affirmed.*

WEED v. LINDSAY.

(Supreme Court of Georgia, 1892. 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33.)

Error from city court of Savannah; W. D. Hardin, Judge.

Summary proceedings by Joseph D. Weed against Lindsay & Morgan to obtain possession of certain land. Judgment for defendants. Plaintiff brings error. Reversed.

The following is the official report:

On October 15, 1890, Weed obtained a warrant to dispossess Lindsay & Morgan of certain real estate in Savannah, alleging in his affidavit therefor that the property was rented to Lindsay & Morgan, who took possession in October, 1889, as tenants at will; that on April 8, 1890, he gave them notice that he desired the possession of his said property at the expiration of two months after the notice; that by this notice, and the expiration of time, the tenancy was terminated and the lease expired; and that afterwards they refused to deliver the possession to him. The defendants, by their counter affidavit, averred that their lease or term of rent from plaintiff had not expired. The jury found for defendants, and plaintiff's motion for a new trial was overruled, to which he excepted. In addition to the general grounds of the motion that the verdict was contrary to law, evidence, etc., it was alleged therein: The court erred in admitting parol evidence to establish a verbal contract on the part of plaintiff to erect a building of specific character and dimensions, not set out in the written contract between the parties, without any allegation in the pleadings that said

* It is established by a great weight of authority that a tenant under a lease for a year or more may be treated as a tenant from year to year if he holds over his term without any new agreement with his landlord. *Belding v. Texas Produce Co.*, 61 Ark. 377, 33 S. W. 421 (1895); *Roberson v. Simons*, 109 Ga. 360, 34 S. E. 604 (1899); *Streit v. Fay*, 230 Ill. 319, 82 N. E. 648, 120 Am. St. Rep. 304 (1907); *Pyle v. Tel. Co.*, 85 Kan. 24, 116 Pac. 229 (1911); *Kuhlman v. Brewing Co.*, 87 Neb. 72, 128 N. W. 1083, 29 L. R. A. (N. S.) 174 (1910); *Whalen v. Manley*, 68 W. Va. 328, 69 S. E. 843 (1910). The landlord may, however, at his election, treat such a holding-over tenant as a trespasser. *Long v. Grant*, 163 Ala. 507, 50 South. 914, 136 Am. St. Rep. 86 (1909); *Hallett v. Barnett*, 51 Colo. 434, 118 Pac. 972 (1911); *Eppstein v. Kuhn*, 225 Ill. 115, 80 N. E. 80, 10 L. R. A. (N. S.) 117 (1906); *Kennedy v. N. Y.*, 196 N. Y. 19, 89 N. E. 360, 25 L. R. A. (N. S.) 847 (1909); *Providence County Savings Bank v. Hall*, 16 R. I. 154, 13 Atl. 122 (1888). In some jurisdictions, however, it is held that a tenant who holds over after the expiration of his term, providing such a holding is assented to by the landlord, becomes a tenant at will. *Hall v. Henninger*, 145 Iowa, 230, 121 N. W. 6, 139 Am. St. Rep. 412 (1909); *Benfey v. Congdon*, 40 Mich. 283 (1879); *Leggett v. Exposition Co.*, 157 Mo. App. 108, 137 S. W. 893 (1911). A tenant who holds over after his term without the consent of his landlord is, by way of distinction, a tenant by sufferance. *Benton v. Williams*, 202 Mass. 189, 88 N. E. 843 (1909).

particulars were intended to be included in the contract, and were omitted by either fraud, accident, or mistake, plaintiff objecting to the introduction of this parol testimony on the grounds that it was irrelevant; that it was not covered or suggested by any pleadings filed in the case; that it was an attempt to add and to vary a written contract by parol; that it set up an agreement concerning land which the statute required to be in writing; and that it presented issues involved in a suit between the parties pending in the superior court of Chatham county. (The case was tried in the city court of Savannah.)

Also that the court erred in refusing to charge the following written requests by the plaintiff: "The written contract between the parties reads as follows: 'Savannah, Georgia, 4th June, 1889. I am to erect a four-story building sixty feet or more front, and Messrs. Lindsay & Morgan agree to pay me four thousand dollars per annum net, if the cost of the building at six per cent., with a valuation of forty thousand dollars for the lot, viz., lot number one, Eyed tything, Heathcote ward, does not exceed that amount. If it does, then Lindsay & Morgan are to pay Joseph D. Weed six per cent. on the cost, including above valuation of lot. Lindsay & Morgan are to pay all taxes, keep the building in repair, and keep building insured for its cost. Upon these conditions Joseph D. Weed agrees to give them a lease for ten years from the date the building is ready for occupation. [Signed] Joseph D. Weed. [Signed] Lindsay & Morgan.' I charge you that the contract I have read was not a present demise or lease which granted to Lindsay & Morgan an immediate estate for years out of the estate of Joseph D. Weed, (Code, § 2278;) but was a contract to give them a future lease for ten years from the date when the building to be constructed was ready for occupation. If you find from the evidence that on June 4, 1889, a contract in writing was made between the parties to this suit, by which the said Joseph D. Weed agreed, upon the terms and conditions therein stated, to give to the said Lindsay & Morgan a lease of the premises described for ten years from the date when the building was ready for occupation; and further find that, before the said building was completed and ready for occupation, the said Lindsay & Morgan, by an arrangement made with the contractor who was erecting the building, and with the consent of the said Joseph D. Weed, began to store their goods therein, and to occupy the same in part before its completion; and further find that after the said building was completed, in November thereafter, the said Joseph D. Weed tendered to the said Lindsay & Morgan, then in the occupation of said building, a written lease of the same for ten years, and that said Lindsay & Morgan objected to the said lease, and refused to sign or execute the same; and that no lease has ever been made or given to the said Lindsay & Morgan for said building, other than the assent of the said Joseph D. Weed to their occupation of said building before completion under an agreement to give them a ten-years lease when said building was ready for occupation; and that no rent has ever been paid by the

said Lindsay & Morgan or received by the said Joseph D. Weed,—then I charge you that the occupation of said building by said Lindsay & Morgan was a tenancy at will, and that they became tenants at will to said Joseph D. Weed. I further charge you that, under the Code of Georgia, two months' notice is necessary from the landlord to terminate a tenancy at will. Code, § 2291. If you find that on the 8th day of April, 1890, the said Joseph D. Weed gave notice to the said Lindsay & Morgan that he desired to terminate said tenancy, and to quit the occupancy and possession of said property after the expiration of two months thereafter, to wit, on June 13, 1890, and that on said June 13, 1890, demand was made for said premises by the said Joseph D. Weed, and was refused by said Lindsay & Morgan, then I charge you that said notice terminated said tenancy; that the said Joseph D. Weed became thereafter entitled to the possession of his said property; and that your verdict must be for the plaintiff."

Also that the court erred in charging: "If Mr. Weed understood the contract in one particular way, and Messrs. Lindsay & Morgan understood it in another particular way; if Mr. Weed knew the way Lindsay & Morgan understood it, and did not correct it,—then that would be the contract that would be binding;" the said charge being obscure in not making it clear to the jury whose understanding would be binding, and there being no evidence to show that Mr. Weed understood the said contract in the particular way that Messrs. Lindsay & Morgan understood it. "The contract in writing is an exceedingly meager one, and is therefore necessarily to be explained by oral testimony. The contract is this as it is written: 'Savannah, Ga., June 4, 1889. I,'—and you will notice that it is signed by Joseph D. Weed and by Lindsay & Morgan. That first word is an ambiguity, it being perfectly apparent on the face of said contract that 'I' referred to said Joseph D. Weed, and there being no ambiguity as to the party intended thereby. It is for me to say to you what this written instrument means, and to say whether or not it is complete, and whether or not oral testimony should come in; and having declared that this is an incomplete and unintelligible contract as it stands, without explanation; that there is an open patent ambiguity in it which may be interpreted two or three or more different ways; and that there are, from the circumstances surrounding it, other ambiguities,—I have allowed oral testimony to explain it. This paper is not a lease, and yet they (meaning Lindsay & Morgan) may hold under it, and it may act as if it were a lease; it may be as binding as a lease; it may take the place of a lease under some circumstances. The view which I hold of this contract is this: The parties entered into or upon these premises under an agreement for a lease. If the agreement had never been carried out to make a lease, if the parties had occupied the building, and the building was such as they had the right to expect, and if they paid up the rent, and Mr. Weed had accepted the rent, and a lease had never been made, then this paper would have stood in the place of a lease. They would have

been tenants for the length of time mentioned in this paper, and they would have had this paper as by its terms to govern the holding which they had. If, however, they failed to pay the rent which was reserved to be paid in this paper, and failed to pay it for a reason which you find to be a good and valid reason; if you find that the amount of four thousand dollars a year was not a proper amount for them to pay because of the failure, on the part of Mr. Weed, to furnish them with such a building as they had under the circumstances the right to expect,—then you must also find that they had, and I so charge you, the right to refuse to pay the entire amount of the rent, and to leave it to the courts to determine, if the parties could not agree as to what amount of rent should be paid, without their becoming tenants at will and liable to ejectment. The law, gentlemen, seeks to be just. It tries to be just as fair as it can be, and there are oftentimes cases where the law is not just if it be strictly construed; therefore our laws have said, our Code has said, or the legislature, speaking through the Code, has said, that wherever there is a right there shall be a remedy to enforce it, and, if the legislature has provided no remedy, the court shall make a remedy for it. Therefore if I thought that under the strict meaning or interpretation of the laws these gentlemen were tenants at will, it would be my duty, if I believed that they had rights which that construction would take away from them, to devise a means by which their right should be protected. If they held the building and refused to pay the rent, being unjustified in so refusing, they are tenants at will, and you must by your verdict find for the plaintiff. If, on the other hand, they acted upon their right to occupy the building, or to not occupy it; if they were in the right in refusing to pay because the rent was not due, or because the amount of rent which was claimed was not due, and they withheld it because the building was necessary to them, and because it was not reasonably suited to their purposes, refused to pay the entire amount of rent demanded,—if you find these to be facts, then it will be your duty to find for the defendants. A tenant at will is one who enters into the possession of the lands or tenements of another lawfully, but for no definite term, and whose possession is subject to the determination of the landlord at any time he sees fit to put an end to it by giving two months' notice to quit, which our statute requires,"—the said charge presenting only a partial view to the jury, and failing to inform them of the reciprocal right of the tenant to terminate the tenancy at his will. "If you find from the testimony that Lindsay & Morgan had an agreement with Mr. Weed whereby they were to get a lease of ten years to the premises in question from the date of the completion of the building, and if you further find from the evidence that Lindsay & Morgan have performed, or have proffered to perform, all their obligations under this agreement, and that they are still entitled to said ten years' lease of said premises, then they are not tenants at will, and your verdict should be for Lindsay & Morgan. If you find from the testimony that Mr. Weed agreed

to erect for Lindsay & Morgan a certain kind of building, and that he did not comply with his contract, but erected one that was inferior to the building he contracted to furnish and less valuable, then Lindsay & Morgan would have the right to have the rent, which they agreed to pay, reduced by such an amount as would compensate them for the damages which they sustained by reason of Mr. Weed's violation of his contract, provided, of course, Lindsay & Morgan make it appear to your satisfaction that they have sustained such damages. If, therefore, the testimony shows that Mr. Weed thus violated his contract, and if no lease was tendered to Lindsay & Morgan until after the building was completed, then they were not under any obligation to sign a lease providing for the four thousand dollars' net rent, but were entitled to a lease at such a reduced rent as would compensate them, or measure the difference in the rental value between the building which Mr. Weed contracted to furnish and the building which they actually got. If you find from the testimony that a lease was tendered by Mr. Weed to Lindsay & Morgan after the completion of the building, and with the rental of four thousand dollars' net provided therein, and if you further find from the testimony that Lindsay & Morgan were not liable for this amount of rent, but were entitled to an abatement of it, and if you further find from the testimony that Mr. Weed was unwilling to give a lease for any less rent and that Lindsay & Morgan rightfully and properly refused to sign the lease, then said refusal on their part did not forfeit their rights under their contract, and did not make them tenants at will. If you find from the testimony that Lindsay & Morgan have performed, or have been ready and willing and offering to perform, all their obligations under their contract with Mr. Weed, and that they are entitled to a lease of the premises for the term of ten years from the completion of the building, then it is not necessary for them to quit the possession of said premises until the courts can decree the specific performance of the contract; but they have the right to remain in possession, and cannot be dispossessed as tenants at will."

Also that the charge did not correctly set forth the legal relations existing between landlord and tenant, was calculated to mislead the jury, and was contrary to law. In his order overruling the motion the judge below stated that, as to the exceptions made to the charge, reference was made to the charge which was filed as a part of the record. * * * ¹⁰

BLECKLEY, C. J. The contract of June 4, 1889, signed by the parties, respectively, a copy of which is in the report, was not a present demise or lease which granted to Lindsay & Morgan an immediate estate for years, but was an agreement to give them a future lease for ten years from the time the building to be erected was "ready for occupation." It is plain from the nature of the agreement and the language of the instrument that the contract was executory on both sides. It

¹⁰ Part of the statement of facts is omitted.

was not contemplated that Lindsay & Morgan should become tenants to Weed, or owners of any interest in the premises, or that they should be liable for the payment of the stipulated rent, if Weed did not erect the building and make it ready for occupation. Until that time should arrive they were to remain without any interest in the property whatever. If the building, as they contend, has not yet been completed and made ready for occupation according to the agreement, the time appointed for an interest to vest in them as lessees, and for their occupation to commence, has not yet arrived; and so they are without any legal ownership of an estate for years, or of a right to possession by virtue of such ownership. The instrument executed as evidence of the contract contains no words of present demise or any equivalent terms, nor does it fix with certainty either the amount of the annual rent to be paid, or appoint any time for the completion of the building and the consequent commencement of the 10 years' term. The amount of the rent was to, or might, depend in part upon the cost of the building, and when the building would be ready for occupation would necessarily depend on contingencies to be met and dealt with after the agreement was signed. It is manifest that the words, "Upon these conditions, Joseph D. Weed agrees to give them a lease for ten years from the date the building is ready for occupation," ought to be construed, not as a stipulation for further assurance, but as an undertaking to create a lease not previously existing, and to pass by it an estate not before conveyed nor attempted to be conveyed. It could not have been the intention of the parties either that Lindsay & Morgan should be owners of the contemplated terms of years, or any term in the premises, before the annual rent which they were to pay began to accrue, or that this rent was to begin to accrue before the building was ready for occupation. In distinguishing between a lease and a mere executory agreement for a lease, the intention of the parties, as manifested by the writing, is a controlling element. Lloyd, Bldg. Cont. § 88; 12 Amer. & Eng. Enc. Law, 980; 1 Wood, Landl. & Ten. § 179; McAdam, Landl. & Ten. § 41; 1 Tayl. Landl. & Ten. § 37 et seq.; 6 Lawson, Rights, Rem. & Pr. § 2801. For cases illustrating the distinction, see *Sturging v. Painter*, Noy, 128; *Jackson v. Ashburner*, 5 Term R. 163; *Hegan v. Johnson*, 2 Taunt. 148; *Jackson v. Delacroix*, 2 Wend. (N. Y.) 433; *People v. Kelsey*, 38 Barb. (N. Y.) 269; *Id.*, 14 Abb. Prac. (N. Y.) 372; *McGrath v. City of Boston*, 103 Mass. 369; *Adams v. Hagger*, 4 Q. B. Div. 480; *Jackson v. Kisselbrack*, 10 Johns. (N. Y.) 336, 6 Am. Dec. 341; *Kabley v. Gaslight Co.*, 102 Mass. 392.

No lease creating a term of 10 years, and vesting the same in Lindsay & Morgan, having ever come into existence as contemplated by the agreement, what was the effect of admitting them into possession by virtue of the consent given by Weed in his letter to them of September 27, 1889, in which he says: "I simply write to tell you, as Mr. Brown told me you wished to begin to occupy the building before it was entirely finished, that the rent will begin from the time you begin to oc-

cupy it. I have no objection whatever to your moving into the building as soon as you find it can serve your convenience to do so." (Mr. Brown was the contractor employed by Weed to construct the building.) Was this permission a license to occupy for 10 years without the execution of any lease, or was it, as events turned out, (possession having been taken under it, and Lindsay & Morgan having afterwards refused to join in the execution of a lease,) the creation of a tenancy at will? We think it was the latter, and, no rent having at any time been paid and accepted, this is in accordance with the current of authority. 1 Tayl. Landl. & Ten. § 60; 1 Washb. Real Prop. p. 376; Tied. Real Prop. § 216; 6 Lawson, Right, Rem. & Pr. § 2809; 12 Amer. & Eng. Enc. Law, 670; Chapman v. Towner, 6 Mees. & W. 100; Anderson v. Railway Co., 3 El. & El. 614; Anderson v. Prindle, 23 Wend. (N. Y.) 616; Dunne v. Trustees, 39 Ill. 578. In Hamerton v. Stead, 3 Barn. & C. 483, Littledale, J., said: "Where parties enter under a mere agreement for a future lease, they are tenants at will: and, if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract." Perhaps, as the law of remedy in the superior court now stands, the payment of rent would have raised, not merely a tenancy from year to year, but one for the whole term covered by the lease. Walsh v. Lonsdale, 21 Ch. Div. 9.

It is plain that, consistently with the written agreement of the parties, Lindsay & Morgan would have no right to occupy and use the premises for 10 years unless they were willing to pay therefor the stipulated rent, nor unless they were willing to occupy as lessees, and not merely as tenants at will. In this litigation they seek, as they did in some of the preliminary steps which led to it, to take the position, and have all the rights of lessees on terms different from any which Weed has ever assented to; that is, they want to hold at a less annual rent than they have agreed to pay. They make this claim because, as they contend, Weed has not erected and made ready for occupation such a building with respect to plan and finish as was contemplated. If this contention be well founded in fact, the result will be, not that they could occupy for 10 years on terms different from those agreed upon, but that they could, if they did not choose to waive their objection and unite in the lease and pay the stipulated rent, exercise their option between vacating the premises, and compelling, by a proper equitable action, a specific performance on the part of Weed of his undertaking. Weed's violation of his contract would also furnish a cause of action in their favor for any damages resulting from his failure to comply. Perhaps if they had, under protest, paid rent according to the contract, they might have done so without surrendering any substantial right, legal or equitable. Lamare v. Dixon, L. R. 6 H. L. 514. When this proceeding was commenced, they had not pursued any course open to them, but had endeavored to pursue one not open; they had declined to join in the lease; had not paid rent at the stipulated rate; had en-

tered no suit for specific performance; and had refused to vacate the premises. Having brought themselves into the position of mere tenants at will, section 2291 of the Code applies to them. The two-months notice having been given, they were subject to eviction as tenants holding over. Code, §§ 4077-4081.

The pleadings in the case were simply the affidavit and counter affidavit provided for by the sections of the Code last cited. The pending application in the superior court to enjoin the prosecution of this proceeding was not operative, because no injunction, temporary or permanent, had been ordered, nor any restraining order granted. What we have ruled embraces all that is fundamental in the case, and effectually controls the final result of this proceeding in the city court.

The court erred in not granting a new trial. Judgment reversed.

TALAMO v. SPITZMILLER.

(Court of Appeals of New York, Second Division, 1890. 120 N. Y. 37, 23 N. E. 980, 8 L. R. A. 221, 17 Am. St. Rep. 607.)

Appeal from superior court of Buffalo, general term.

BRADLEY, J. The action was brought to recover the proceeds of the sale made by the defendant of the plaintiff's goods. The defendant admits his liability to account to the plaintiff for the proceeds of such sale, and alleges several matters by way of counter-claim, which will be referred to so far as is essential to the determination of the questions presented for consideration on this review. The trial court found that on March 13, 1882, by an agreement of lease in writing under seal made by Catharine Dickman and defendant, she leased to him a dwelling-house for the term of five years from May 1, 1882, at the annual rent of \$450 for the first year, and \$500 for each subsequent year, payable in equal monthly installments in advance, which the defendant undertook to pay; that the defendant took such lease at the verbal instance and request of the plaintiff, and upon the unwritten understanding and agreement that they should jointly use and occupy the dwelling-house during the term mentioned in the lease, and that the plaintiff should pay to the defendant half the rent; that the defendant and the plaintiff went into the possession of the house in May, 1882, and jointly occupied it until in November following, when the plaintiff quit the house, and has not since then occupied any portion of it; that the defendant has paid the monthly installments of rent as they fell due, and that the plaintiff has paid nothing to the defendant on account of the rent. The court allowed to the defendant, against the plaintiff, a sum equal to one-half the rent for the period of the joint occupancy,—six and a half months. And upon the exception to the conclusion of the court that the plaintiff was entitled to recover the amount for which judgment was directed, arises the question whether the defendant was entitled to the

allowance of a greater amount against the plaintiff than that given by the court on account of the rent.

The contention of the defendant's counsel is: (1) That the plaintiff became liable to pay the defendant, one-half the rent which the latter undertook by the lease to pay as the installments should become due; (2) that, if not so, the plaintiff became a yearly tenant, and was liable to the defendant for one-half the amount of the rent for one year. The plaintiff, not being a party to the lease, assumed no legal obligation to pay rent for the term, as a lease for more than one year, not in writing, was void. 2 Rev. St. 135, §§ 6, 8. The agreement between the parties, and under which the plaintiff entered into joint occupancy with the defendant, being void, gave to the plaintiff no right, and imposed upon the defendant no obligation, to permit him to go into or remain in possession of any portion of the house, and unless he became a yearly tenant his liability was for use and occupation for the time only which he occupied. *Thomas v. Nelson*, 69 N. Y. 118. The mere fact that a person goes into possession under a lease, void because for a longer term than one year, does not create a yearly tenancy. If he remains in possession with the consent of the landlord for more than one year, under circumstances permitting the inference of his tenancy from year to year, the latter could treat him as such, and the tenant could not relieve himself from liability for rent up to the end of the current year; and the terms of the lease, void as to duration of term, would control in respect to the rent. *Coudert v. Cohn*, 118 N. Y. 309, 23 N. E. 298, 7 L. R. A. 69, 16 Am. St. Rep. 761. The parol agreement for five years was not effectual to create a tenancy for one year. Nor did the mere fact that the plaintiff went into possession have that effect. He remained in occupation a part of one year only, and the creation of a tenancy for a year was dependent upon something further. While it is not required that a new contract be made in express terms, there must be something from which it may be inferred,—something which tends to show that it is within the intention of the parties. The payment and receipt of an installment or aliquot part of the annual rent is evidence of such understanding, and goes in support of a yearly tenancy, and, without explanation to the contrary, it is controlling evidence for that purpose. *Cox v. Bent*, 5 Birg. 185; *Bishop v. Howard*, 2 Barn. & C. 100; *Braythwayte v. Hitchcock*, 10 Mees. & W. 494; *Mann v. Lovejoy*, Ryan & M. 355; *Thomas v. Packer*, 1 Hurl. & N. 672; *Doe v. Crago*, 6 C. B. 90.

While there may appear to have been some confusion in the cases in this state, upon the subject, this doctrine has been more recently recognized. *Reeder v. Sayre*, 70 N. Y. 184, 26 Am. Rep. 567; *Laughran v. Smith*, 75 N. Y. 209. In the cases last cited the tenants had been in possession more than a year when the question arose, but, having gone into occupancy under an invalid lease, their yearly tenancy was held dependent upon a new contract, which might be implied

from the payment and acceptance of rent, and, when once created, could be terminated by neither party, without the consent of the other, only at the end of a year. The contention, therefore, that by force of the original agreement between the parties, aided by the fact that the plaintiff went into the possession with the consent of the defendant, is not alone sufficient to support an inference of the new contract requisite to create a yearly tenancy. The plaintiff paid no rent, nor while he was in possession was any request of or promise by him made to pay any. He simply went in under the original void agreement, and left within the year. There was no evidence to require the conclusion of the trial court that the plaintiff had assumed any relation to the premises which charged him with liability, other than for use and occupation, during the time he remained in possession.

The defendant's counsel, to support his proposition that the entry by the plaintiff with the consent of the defendant made him a yearly tenant, cites *Craske v. Publishing Co.*, 17 Hun, 319, where it was remarked that a parol lease for a longer term than one year "operated so as to create a tenancy from year to year." If that was intended by the learned justice as a suggestion that such a void lease operated as a demise for one year, it is not in harmony with the view of the court in *Laughran v. Smith*, *supra*. That remark in the *Craske Case* was not essential to the determination there made, as rent was in fact paid for a portion of the term; nor can it be assumed that it was intended to have the import sought to be given to it. It must be assumed, upon authority and reason, that a parol lease for more than one year is ineffectual to vest any term whatever in the lessee named; and that when he goes into possession under it, with the consent of the lessor, without any further agreement, he is a tenant at will merely, subject to liability to pay at the rate of the stipulated rent as for use and occupation. *Barlow v. Wainwright*, 22 Vt. 88, 52 Am. Dec. 79. This may be converted into a yearly tenancy by a new contract, which may be implied from circumstances, when they permit it. While the mere entry with consent will not alone justify it, a promise to pay, and a purpose manifested to accept, a portion of the annual rent provided for by the agreement may, as evidence, go in support of such a new contract. There was no such evidence in this case. The promise of the plaintiff to pay one-half the rent was made preliminarily to his entry, and was part of and not distinguishable from the parol agreement with the defendant to occupy for five years, and pay one-half the rent for that term. There does not seem to have been any evidence to require the conclusion that any other than such void agreement was made between the parties, or that the plaintiff became other than a mere tenant at will of the defendant. 1 Woodf. Landl. & Ten. (1st Amer. Ed. from 13th Eng. Ed.) 221.

The other cases cited by the defendant's counsel do not support the proposition asserted by him. There is no opportunity, upon the facts found, or upon any, the finding of which the evidence requires, to

hold that the defendant took and held the lease as trustee for the plaintiff as to a portion of the demised premises, or that a relation was assumed by the plaintiff to the lease, between the lessor and the defendant, which legally charged him with liability to the latter for moneys paid by him pursuant to it. The parol agreement between them was void and ineffectual for any such purpose.

The judgment should be affirmed. All concur.

II. Tenancies from Year to Year ¹¹

1. CREATION

See *Hunter v. Frost*, ante, p. 146, and *Talamo v. Spitzmiller*, ante, p. 157.

2. TERMINATION

See *Hunter v. Frost*, ante, p. 146.

III. Tenancies at Sufferance ¹²

RUSSELL v. FABYAN.

(Supreme Judicial Court, New Hampshire, 1856. 34 N. H. 218.)

This is an action on the case, brought July 2, 1853. In the declaration it was alleged in substance that the defendant Fabyan, having been a tenant of a certain hotel in Carroll for a term of five years, which expired on the 20th of March, 1852, the defendants wrongfully continued to occupy the same after the said lease expired; and so negligently and carelessly conducted and managed certain fires by them set and kept in said hotel, that on the 29th of April, 1853, the same was burned down and consumed. The defendants pleaded severally the general issue—not guilty.

To show title to the house described in the declaration, the plaintiff showed that the land on which it stood, together with a part of the house, were in possession of E. A. Crawford on December 12, 1837, and for many years before, and that on that day said Crawford conveyed the same to Nathaniel Abbot, who, on June 24, 1842, conveyed the same to Daniel Burnham. Said Burnham, on the 20th of August,

¹¹ For discussion of principles, see *Burdick*, Real Prop. §§ 88-90.

¹² For discussion of principles, see *Burdick*, Real Prop. §§ 91-94.

1844, deeded the same hotel and land to the plaintiff. The plaintiff, on January 28, 1847, executed a lease of said hotel to the defendant Fabyan, for the term of five years from March 20, 1847, who held the same under said lease until he accepted a lease from one Dyer, as hereinafter mentioned. On the 19th of March, 1852, an agent of the plaintiff, duly authorized, called upon said Fabyan, at Conway, where he resided, and on the 20th of March called upon said Fabyan's servant, who had charge of said hotel, at said hotel, and on the 22d of March again called on said Fabyan, at Conway, and on each occasion demanded that possession of said hotel should be surrendered to the plaintiff, which was refused—said Fabyan saying that he had taken a lease from said Dyer. And it appeared that on March 19, 1852, and from that time until after said hotel was burned, said Fabyan held possession of the same by lease from said Dyer, who had also agreed to indemnify him against any suit brought against him by said Russell for rents, and from all costs, trouble and expense of any kind which might happen to him on account of his taking said lease. On April 29, 1853, said hotel, then occupied as such, took fire from some one of the stoves or fire-places used therein for cooking, or for warming the building, or from sparks from the same, and was entirely consumed. * * *¹⁸

BELL, J. Fabyan entered into possession of the premises in question under a written lease, to continue for five years from March 20, 1847. He remained in possession until April 29, 1853, when the buildings were burned down, more than a year after the lease expired. During the interval between the 20th of March, 1852, and April 29, 1853, he was either a tenant at sufferance, a tenant at will, or a disseizor. The general principle is that a tenant who, without any agreement, holds over after his term has expired, is a tenant at sufferance. 2 Bla. Com. 150; 4 Kent, Com. 116; *Livingston v. Tanner*, 12 Barb. (N. Y.) 483. No act of the tenant alone can change this relation; but if the lessor, or owner of the estate, by the acceptance of rent, or by any other act indicates his assent to the continuance of the tenancy, the tenant becomes a tenant at will, upon the same terms, so far as they are applicable, of his previous lease. *Conway v. Starkweather*, 1 Denio (N. Y.) 113.

In this case there is no evidence to justify an inference of assent by the lessor to any continuance of the tenancy, but, on the contrary, very direct and conclusive evidence, in the demand of possession, to the contrary; while the reply made to that demand by Fabyan negatives any consent on his part to remain tenant of the plaintiff. There was, then, no tenancy in fact between these parties at the time of the fire, and the defendant was consequently either a disseizor or a tenant at sufferance.

¹⁸ Part of the statement of facts is omitted.

When the demand of possession was made upon Fabyan, upon the 22d of March, 1852, the demand was refused, Fabyan saying he had taken a lease of the property from Dyer. The previous demands seem to have been premature, and before the expiration of the lease, but they were refused upon the same ground as the last, and that refusal might constitute a waiver of any objection to the time of their being made.

Such a denial of the right of the lessor, though not a forfeiture of a lease for years, is sufficient to put an end to a tenancy at will, or at sufferance, if the lessor elects so to regard it; and he may, if he so choose, bring his action against the tenant as a disseizor, without entry or notice, and may maintain against him any action of tort, as if he had originally entered by wrong. *De Lancey v. Ga Nun*, 12 Barb. (N. Y.) 120.

But as this result depends on the lessor's election, and nothing appears in the present case to indicate such election, the tenant must be regarded as a tenant at sufferance.

To ascertain the liability of a tenant at sufferance for the loss of buildings by fire, it becomes material to inquire, what is the nature of this kind of tenancy; and we have examined the books accessible to us, to trace the particulars in which it differs from the case of a party who originally enters by wrong.

All the books agree that he retains the possession as a wrongdoer, just as a disseizor acquires and retains his possession by wrong. *Den v. Adams*, 12 N. J. Law, 99; 2 Bla. Com. 150; 4 Kent, Com. 116. By the assent of the parties to the continuance of the possession thus wrongfully obtained or retained, the wrong is purged, and the occupant becomes a tenant at will or otherwise to the owner. 10 Vin. Ab. 416, *Estate, D, C, 2*.

If no such assent appears, the tenant is entitled to no notice to quit. *Livingston v. Tanner*, 12 Barb. (N. Y.) 483; *Jackson v. McLeod*, 12 Johns. (N. Y.) 182; 1 Cru. Dig. tit. 9, § 10.

The owner may make his entry at once upon the premises, or he may commence an action of ejectment or real action. *Livingston v. Tanner*, 12 Barb. (N. Y.) 483; *Den v. Adams*, 12 N. J. Law, 99. And it makes no difference that the lessee, after his term has expired, has taken a new lease for years of a stranger rendering rent, which has been paid; for he still remains tenant at sufferance as to the first lessor, as was held in *Preston v. Love*, Noy, 120; 10 Vin. Ab. 416.

We have been able to discover but one point of difference between the case of the disseizor and the tenant at sufferance, which is that the owner cannot maintain an action of trespass against his tenant by sufferance, until he has entered upon the premises; 4 Kent, Com. 116; a point to which we shall have occasion further to advert.

Upon this view the liability of the defendant Fabyan, to answer for the loss by fire, which is the subject of this suit, is regulated, not by the rule applicable to tenants under contract, or holding by right,

but by that which governs the case of the disseizor and unqualified wrong-doer.

By Stat. 6 Anne, c. 31, made perpetual 10 Anne, c. 14, (1708, 1712,) no action or process whatever shall be had, maintained or prosecuted against any person in whose house or chamber any fire shall accidentally begin. Co. Litt. 67, n. 377; 3 Bla. Com. 228, n.; 1 Com. Dig. 209, Action for Negligence, A, 6. It is not necessary to consider whether this statute has been adopted here, though it is strongly recommended by its intrinsic equity, because at all events a different rule applies in this case.

The mere disseizor or trespasser, who enters without right upon the land of another, is responsible for any damage which results from any of his wrongful acts. Such a disseizor is liable for any damages occasioned by him, whether willful or negligent. He had no right to build any fire upon the premises, and if misfortune resulted from it he must bear the loss.

For this purpose the defendant Fabyan stands in the position of a disseizor.

II. Assuming that Fabyan is liable for the loss of these buildings, the question arises, whether he is liable in this form of action; and, as we have remarked, he is not liable in trespass. Chancellor Kent, (4 Com. 116,) says: "A tenant at sufferance is one that comes into possession of land by lawful title, but holdeth over by wrong after the determination of his interest. He has only a naked possession, and no estate which he can transfer, or transmit, or which is capable of enlargement by release, for he stands in no privity to his landlord, nor is he entitled to notice to quit; and, independent of the statute, he is not liable to pay any rent. He holds by the laches of the landlord, who may enter and put an end to the tenancy when he pleases. *But before entry he cannot maintain an action of trespass against the tenant by sufferance.*" 1 Cru. Dig. tit. 9, c. 2; Rising v. Stannard, 17 Mass. 282; Keay v. Goodwin, 16 Mass. 1, 4; 2 Bla. Com. 150; Co. Litt. 57, b; Livingston v. Tanner, 12 Barb. (N. Y.) 483; Trevillian v. Andrew, 5 Mod. 384.

If, then, Fabyan is answerable at all, he must be liable to the action of trespass on the case. There is no evidence of any entry, and the demand of possession, whatever its other effects may be, is not an entry, nor do we find it made equivalent to an entry.

The case of West v. Trende, Cro. Car. 187, s. c. Jones 124, 224, is a decision that case lies in such a case.

"Action upon the case. Whereas he was and yet is possessed of a lease for divers years adtunc et adhuc ventur, of a house, and being so possessed demised it to the defendant for six months, and after the six months expired, the defendant being permitted by the plaintiff to occupy the said house for two months longer, he, the defendant, during that time pulled down the windows, etc. Stone moved in arrest of

judgment that this action lies not, for it was the plaintiff's folly to permit the defendant to continue in possession, and to be a tenant at sufferance, and not to take course for his security; and if he should have an action, it should be an action of trespass, as Littleton, § 71. If tenant at will hath destroyed the house demised, or shop demised, an action of trespass lies, and not an action upon the case. But all the court conceived that an action of trespass or an action upon the case may well be brought at the plaintiff's election, and properly in this case it ought to be an action upon the case, to recover as much as he may be damnified, because he is subject to an action of waste; and therefore it is reason that he should have his remedy by action upon the case. Whereupon rule was given that judgment should be entered for the plaintiff."

III. It seems clear that if Fabyan is to be regarded as a wrongdoer in retaining the possession of the plaintiff's property after his lease had expired, all who aided, assisted, encouraged or employed him to retain this possession, must be regarded as equally tort-feasors, and equally responsible for any damage resulting from his wrongful acts. No more direct act could be done to encourage a tenant in keeping possession, than that of leasing to him the property, unless it was that of giving him a bond of indemnity, such as is stated in this case. In wrongs of this class all are principals, and the defendant, Dyer, must be held equally responsible with Fabyan; and it seems clear that as Dyer could justify in an action of trespass under the authority of Fabyan, so as, like him, not to be liable in that action, he must be liable with him in an action upon the case.

Whether the allegations of the declarations are suitable to charge either of the defendants, we have not considered, as the court have not been furnished with a copy.

IV. The case of *Russell v. Fabyan*, 27 N. H. 529, is not to be regarded as a decision of the question raised in this case, in relation to the sale of a supposed right of redemption as belonging to Burnham, after the first levy made upon the property. It was there held, upon the facts appearing in that case, that independent of the question of fraud in Burnham's deed to Russell, all Burnham's right of redeeming the levy, which might be made upon the attachment subsisting at the time of the deed, and of course good against it, passed to Russell. Upon this point there can be no question, and none is suggested. The question then arose, whether, if Russell's deed was proved to be fraudulent as to the creditors of Burnham, the right of redemption did not pass to Dyer by the sale on his second execution, so as to invalidate the tender made by Russell. This question might have been met and decided, but the case did not require it. It was held that whether Russell's title was good or bad, Fabyan, as his tenant, could not dispute it. He could be discharged from his liability to pay his rent, which was the subject of that action, only by an eviction by the lessor,

or by someone who had a paramount title to his; a mere outstanding title not put in exercise is not a defence. The defendant relied on an eviction on the 14th of June, 1848, as his defence. The sale of the right of redemption was made on the 31st of July following, and after that date there was no eviction, so that the attempt there was merely to show an outstanding but dormant title, which it proved would be no defence. And the court took the ground that Fabyan stood in no position to raise a question as to the validity of Russell's title, except so far as the opposing title was the occasion of some disturbance of his estate. So far as the principles stated in that case are concerned, they appear to us sound and unanswerable. Whether, if the case had taken a different form, the result would have been in any degree different, it is not necessary to enquire.

By our statute, every debtor whose land or any interest in land is sold or set off on execution, has a right to redeem by paying the appraised value, or sale price, with interest, within one year. *Rev. Stat. c. 195, § 13; Id. c. 196, § 5; (Comp. Stat. 501, 502.)* This right to redeem is also subject to be levied upon and sold, as often as a creditor supposes he can realize any part of his debt by a sale, until some one of the levies or sales becomes absolute. But these sales have each inseparably connected with them the right of redemption. If the debtor has parted with his title before the levies are made while the property is under an attachment, that right of redemption is vested in his grantee, who, being the party interested, (*Rev. Stat. c. 196, § 14,*) may redeem any sale or levy, if he pleases; the effect of his payment or tender for this purpose being of course dependent upon the state of facts existing at the time.

So, if there is no attachment upon the property at the time of the debtor's conveyance, but his creditors levy upon the property, upon the ground that his conveyance was not made in good faith, and upon an adequate consideration, and so is fraudulent and void as to them, the effect is the same. Any creditor may levy his execution upon the right of redemption of any prior levy or sale, the deed of the debtor being without legal operation to place either the property itself or any interest in it out of the reach of his process. And the right of redemption, so long as it retains any value in the judgment of any creditor, remains liable to his levy; but when the creditors have exhausted their legal remedies, the right of redemption, necessarily incident to every levy on real estate, still remains, and it is the right not of the debtor, but of his grantee, who may exercise it at his pleasure.

This we conceive was the position of the present case. The first levy by Dyer being founded on his attachment, took precedence of Russell's deed; but Russell had still the right to redeem as grantee of Burnham, whether his deed was valid as to creditors or not. When the right of redeeming the first levy was sold, on the ground that the deed to Russell was fraudulent and invalid, a right of redemption still remained to Russell, and he had a right, as a party interested in the

land, to pay or tender the amount of the first levy to Dyer, and so to discharge it. By that payment or tender it was effectually discharged, whatever might be the rights or duties of Dyer, or Russell, or any one else, growing out of the sale of the right of redemption upon Dyer's second execution, which, being founded upon no attachment was *prima facie* a nullity as to Russell, and was dependent for its effect upon the evidence that might be offered, showing Russell's deed void as to creditors.

The present case stands free from any question growing out of the relation of landlord and tenant, as that relation is not alleged, and the lease of Russell had expired, and Dyer had never stood in that relation. The evidence offered that Burnham's deed to Russell was fraudulent as to his creditors, is not open to any objection of that kind, which was held decisive in 27 N. H. If the facts warrant that defence, the evidence is competent; and if it should be shown that the deed to Russell was void as to creditors, and Dyer was one of that class, his second levy was good, if properly made, and the title to these premises passed to him, subject to his prior and any subsequent levy, and to Russell's right of redemption.

As the offer of the defendant to prove Burnham's deed to Russell to be fraudulent and void as to creditors, and as to the defendant, Dyer, as one of them, was refused, there must be a new trial.

IV. Licenses—Revocation of ¹⁴

FERGUSON v. SPENCER.

(Supreme Court of Indiana, 1890. 127 Ind. 66, 25 N. E. 1035).

Appeal from circuit court, Warren county; Frank E. Everett, Special Judge.

MITCHELL, J. The nature of the action as disclosed by the pleadings is not very well defined. It may be regarded as a suit to recover damages caused by interrupting the flow of an artificial stream through, or diverting it from, a tile drain through which water was supplied to the plaintiff's animals on her farm. The merits of the case may be determined upon the following facts returned to the court in a special verdict: In 1884, the plaintiff, Mrs. Spencer, and the appellant, William Ferguson, were adjoining land-owners in Warren county, their farms being separated by a public highway running east and west, on the division line. Their farms occupied such a relation as that surface and spring water collected on, and issuing from, the defendant's land was discharged over and through a depression, with more or less defined banks, through a similar depression over

¹⁴ For discussion of principles, see Burdick, Real Prop. §§ 97, 98.

and upon the plaintiff's land. In the year above mentioned the parties mutually agreed to construct a covered tile drain, of specified dimensions, to be laid at a given depth, each to construct the distance required on his or her own land. In pursuance of this agreement, the plaintiff, commencing at the highway separating her farm from that of the defendant, constructed a drain of the dimensions agreed upon, of the length of 40 rods, at a cost of over \$60. The defendant at the same time constructed a similar drain on his land, connecting it with that built by the plaintiff at one end, and with an existing tile drain on his land at the other, thereby making a continuous drain over the lands of both, through which water flowed constantly. The drain thus constructed was beneficial to the plaintiff's farm, enhancing its value by affording her more perfect drainage than before, and by furnishing a constant supply of living water for stock on her farm, she having utilized the water by constructing a convenient watering place. In 1887, the defendant refused to continue the arrangement, and dug up some of the tiling on his own land, so as to disrupt the drain, and diminish the supply of water, to the damage of the plaintiff.

The question is, whether or not, after money had been expended in constructing the drain, in reliance upon the agreement, either of the parties, without the consent of the other, could terminate the arrangement, without becoming liable for any damage which might result. The effect of the agreement, when acted upon by the parties, was to create mutual or cross licenses in favor of each in the land of the other. Each was given a license from the other to make use of the other's land for the purpose of conducting water over it, for a purpose supposed to be beneficial to his own land. A "license" is defined to be an authority given to do some act, or a series of acts, on the land of another without possessing an estate therein. *Cook v. Stearns*, 11 Mass. 533; 13 Amer. & Eng. Enc. Law, 539. By means of the arrangement entered into, the plaintiff obtained a license to connect the covered tile drain which she constructed with a similar drain constructed by the defendant, thereby affording her the means of drawing or conducting water from springs and other sources on the defendant's land, for the benefit of her farm. This is found to have been a valuable privilege, to obtain which the plaintiff expended money in reliance upon a mutual agreement entered into with the defendant. It is everywhere settled that a parol license to use the land of another is revocable at the pleasure of the licensor unless the license has been given upon a valuable consideration, or money has been expended on the faith that it was to be perpetual or continuous. Where a license has been executed by an expenditure of money, or has been given upon a consideration paid, it is either irrevocable altogether, or cannot be revoked without remuneration, the reason being that to permit a revocation without placing the other

party in statu quo would be fraudulent and unconscionable. *Nowlin v. Whipple*, 120 Ind. 596, 22 N. E. 669, 6 L. R. A. 159; *Robinson v. Thrailkill*, 110 Ind. 117, 10 N. E. 647; *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370; *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358. Where a license is coupled with an interest, or the licensee has done acts in pursuance of the license which create an equity in his favor, it cannot be revoked. *Iron Co. v. Wright*, 32 N. J. Eq. 248.

The present case is closely analogous to *Clark v. Glidden*, supra, where it was held that an executed license to lay pipes to conduct water from one farm to another, for the benefit of the owner of the latter, was irrevocable, and the licensor was enjoined, upon terms, from interfering with the water-pipes laid in pursuance of the license. The present case is not distinguishable in principle. It may be conceded that the adjudications upon the subject of the right to revoke parol licenses are not uniform, and that they cannot be successfully classified or arranged into harmonious groups; but it is the settled law of this state, as it is of many others, that, where a license involving the expenditure of money has been so far executed that its withdrawal would operate as a fraud upon the person who expended money in reliance upon it, no revocation can take place without making compensation to the person injured by the withdrawal. *Simons v. Morehouse*, 88 Ind. 391, and cases cited; *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152. Thus, in *Rerick v. Kern*, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497, and note, a leading case on the subject, it is held that an executed license, the execution of which involved the expenditure of money or labor, is regarded in equity as an executed agreement for a valuable consideration, and that it is therefore irrevocable, although given merely by parol, and relating to the use and occupation of real estate. This doctrine is so thoroughly settled by the decisions of this court that we do not deem it profitable to elaborate the subject further. See 5 Lawson, Rights & Rem. § 2675; *Woodbury v. Parshley*, 7 N. H. 237, 26 Am. Dec. 739. The rule is, of course, different where nothing but a mere naked license is involved. *Parish v. Kaspere*, 109 Ind. 586, 10 N. E. 109. It may be conceded that a different rule prevails in the state of New York, as well as in some other states. *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Johnson v. Skillman*, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192.

Some other questions of minor importance, which do not affect the merits of the case, are suggested. It is sufficient to say we have examined these questions, and find no error which would justify a reversal of the judgment. Judgment affirmed, with cost.

JOINT OWNERSHIP OF ESTATES

I. Joint Tenancies ¹

1. DEFINITION—HOW CREATED

SIMONS v. McLAIN.

(Supreme Court of Kansas, 1893. 51 Kan. 153, 32 Pac. 919).

Error from district court, Sedgwick county; C. Reed, Judge.

Action of ejectment by Lewis Simons against Hester McLain. There was judgment for defendant, and plaintiff brings error. Reversed.

The facts on which are based the claims of Lewis Simons, the plaintiff, and Hester McLain, the defendant, are as follows:

On the 17th day of May, 1872, and for more than one year prior thereto, Charles H. Hunter was the owner in fee simple of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 28, township 27 S., of range 1 E. of the sixth P. M., in Sedgwick county. On the 17th day of May, 1872, while still seised in fee simple of said lands, Hunter, a single man, executed and delivered to Lewis Simons and E. G. Tewksbury his warranty deed, dated that day, for the above-described lands. The following is a copy of said deed, omitting the certificate of acknowledgment, which was in due form:

"This deed, made this seventeenth day of May, in the year of our Lord one thousand eight hundred and seventy two, between Charles H. Hunter, (a single man,) of Wichita, county of Sedgwick, and state of Kansas, of the first part, and Lewis Simons and E. G. Tewksbury, of Hillsborough, and state of New Hampshire, of the second part, witnesseth. That the said party of the first part, for and in the consideration of the sum of \$1,200, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, remise, release, alien, convey, and confirm unto the said party of the second part, and to their heirs and assigns, forever, all of the following described tract, piece, and parcel of land, lying and situate in the county of Sedgwick and state of Kansas, to wit, the northeast one quarter of the northeast one quarter of section No. 28, in township No. 27 south, of range 1 east, containing 40 acres, more or less. [Stamp \$1.50.] Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining. To have and to hold the same unto the said parties of the second part, their heirs and as-

¹ For discussion of principles, see Burdick, Real Prop. § 101.

signs, forever. And the said Charles H. Hunter, for himself and his heirs, does hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, that he will warrant and forever defend the same lands and appurtenances, and every part and parcel thereof, unto the said parties of the second part, their heirs and assigns, against the said party of the first part and his heirs, and against all and every person or persons whomsoever lawfully claiming or to claim the same. In testimony whereof the said party of the first part has hereunto set his hand the day and year first above written. Executed and delivered in the presence of C. A. Philip. Charles H. Hunter. [Seal.]”

The deed was filed for record and recorded in the office of the register of deeds of Sedgwick county in this state.

On the 22d day of March, 1877, E. G. Tewksbury died without having alienated the land, or any part thereof, during his lifetime. On the 28th of March, 1877, letters testamentary with the will annexed, were issued to Submit R. Tewksbury as executrix of the last will and testament of E. G. Tewksbury, deceased, by the probate court of Hillsborough county, N. H., a court having jurisdiction of the estate of E. G. Tewksbury, deceased. On the 21st day of February, 1882, Submit R. Tewksbury filed in the office of the probate court of Sedgwick county a properly authenticated copy of her appointment as executrix of said estate by the probate court of Hillsborough county, N. H. She also filed her petition in the probate court of Sedgwick county, praying for an order to sell real estate to pay debts of E. G. Tewksbury, deceased. All the proper steps necessary for the execution of a deed in proper form by an executrix with the will annexed were observed, and Submit R. Tewksbury, on May 8, 1882, as executrix of the estate and last will and testament of E. G. Tewksbury, deceased, executed a deed for the undivided one half of said lands to Henry Schweiter. On the 12th day of June, 1882, Lewis Simons and Mary Simons, his wife, executed and delivered to Henry Schweiter their warranty deed for an undivided one half of said premises. The deed made by Lewis Simons was executed and delivered after the death of E. G. Tewksbury. Lewis Simons has made no other conveyance of said land. All the interest that Henry Schweiter acquired in the land described in the petition by virtue of said deeds has passed by sundry mesne conveyances from Henry Schweiter to Hester McLain, who claims to own, not only the undivided half of the land as described in the petition, but also the other undivided one half, all of which is included in the tract conveyed by Charles H. Hunter to Lewis Simons and E. G. Tewksbury. The plaintiff claims to own the undivided one half of the premises as set forth in the petition, and not conveyed by him.

Lewis Simons, the plaintiff, commenced his action in the ordinary form of ejectment. Hester McLain, the defendant, answered by

setting out in full the facts on which her title was based. The plaintiff demurred to this answer, as not alleging facts sufficient to constitute a defense. The court overruled the demurrer. The plaintiff elected to stand upon the demurrer, whereupon the court rendered judgment for the defendant. The plaintiff excepted, and brings the case here for review.

HORTON, C. J., (after stating the facts.) One question only is presented by the record, and that is whether, on the 22d day of March, 1877, the date of the death of E. G. Tewksbury, estates by joint tenancy existed in Kansas. By the common law, if an estate was conveyed to two or more persons without indicating how the same was to be held, it was understood to be in joint tenancy. A joint tenancy is defined to be "when several persons have any subject of property jointly between them in equal shares by purchase." "Each has the whole and every part with the benefit of survivorship, unless the tenancy be severed." In the quaint language of the law they hold, each per my et per tout, the effect of which, technically considered, is that, for purposes of tenure and survivorship, each is the holder of the whole. The grand incident of joint tenancy is survivorship, by which the entire tenancy on the decease of any joint tenant remains to the survivors, and at length to the last survivor. 1 Washb. Real Prop. (5th Ed.) §§ 406, 408; Black, Law Dict. 651; And. Law Dict. 1018. By the policy of the American law, "joint tenancy, if not a subject of aversion, is rarely a matter of preference." Freem. Coten. (2d Ed.) § 35. In Connecticut, the judiciary, at an early day, entirely ignored what they styled "the odious and unjust doctrine of survivorship." Phelps v. Jepson, 1 Root, 48, 1 Am. Dec. 33; Whittlesey v. Fuller, 11 Conn. 340. In Ohio the supreme court held that joint tenancy did not exist on account of the statute in that state of partition and distribution. Sergeant v. Steinberger, 2 Ohio, 305, 15 Am. Dec. 553; Penn v. Cox, 16 Ohio, 30; Wilson v. Fleming, 13 Ohio, 68. But in most of the states the rule of the common law concerning estates in joint tenancy continued until abolished by statute. 1 Washb. Real Prop. (5th Ed.) 677, 678, notes, with states and statutes referred to.

In this state the legislature, on March 10, 1891, passed an act "to abolish survivorship in joint tenancy." Sess. Laws 1891, c. 203, p. 349. A majority of this court in Baker v. Stewart, 40 Kan. 442, 19 Pac. 904, 2 L. R. A. 434, 10 Am. St. Rep. 213, and Shinn v. Shinn, 42 Kan. 1, 21 Pac. 813, 4 L. R. A. 224, recognized "estates in entirety" where the deed is made to the husband and wife, and ruled that in such a case, the survivor of the two, at the death of the other, was entitled to the entire estate. This, of course, was a full adoption of the rule of "estates in entirety" as recognized by the common law. The writer of this dissented in that case. But, following the law thus declared by the majority of the court, and in view of the recognition

of joint tenancy by the statutes of the state, and that "survivorship in joint tenancy" was not expressly abolished by statute until 1891, long after the execution of the deed of the 17th of May, 1872, and long after the death of E. G. Tewksbury on the 22d of March, 1877, we must hold that estates by joint tenancy existed in Kansas prior to March 10, 1891.

The reasons are much stronger for recognizing estates by joint tenancy, as existing in Kansas prior to March 10, 1891, than that "estates in entirety" existed, in view of the statutes and decisions of this state, recognizing the separate existence of the wife from the husband. "The *jus accrescendi* is as much an incident of estates in joint tenancy as of estates in entirety." 2 Cooley, Bl. Comm. 181, and note 2; 1 Washb. Real Prop. 406; *Dowling v. Salliotte*, 83 Mich. 131, 47 N. W. 225. Paragraph 7281, c. 119, Gen. St. 1889, reads: "The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the General Statutes of this state; but the rule of the common law that statutes in derogation thereof shall be strictly construed shall not be applicable to any general statute of this state, but all such statutes shall be liberally construed, to promote their object." See, also, the act in relation to landlords and tenants, concerning joint tenants, (paragraphs 3630, 3631, Gen. St. 1889.) Then, again, the legislature, in passing the act of March 10, 1891, abolishing joint tenancy, impliedly admitted the previous existence of such estates. That act closes as follows: "But nothing in this act shall be taken to affect any trust estate." Sess. Laws 1891, c. 203.

The judgment of the district court will be reversed, and cause remanded for further proceedings in accordance with the views herein expressed. All the justices concurring.

2. SURVIVORSHIP

WILKENS v. YOUNG.

(Supreme Court of Indiana, 1895. 144 Ind. 1, 41 N. E. 68, 55 Am. St. Rep. 162).

Appeal from circuit court, Allen county; C. M. Dawson, Special Judge.

Action by Mary M. Young and another against John H. Wilken and another to recover possession of and to quiet title to land. From a judgment for plaintiffs, defendants appeal. Affirmed in part, and reversed in part.

JORDAN, J. Action by appellees in the lower court, wherein they sought to recover the possession of certain described real estate from the appellant John H. Wilken, and to quiet their title thereto against

both of the appellants. A trial resulted in a judgment in favor of appellees, from which appellants prosecute this appeal, and assign numerous errors, whereby they assail certain rulings and decisions of the trial court, and the final judgment and decree thereof. At the request of the parties, the court found the facts specially, and stated its conclusions of law thereon. As this finding is supported in its material points by the evidence, and as the principal questions involved in this appeal are fully presented by said finding and conclusions of law thereon, we deem it only necessary to consider the alleged errors arising out of these conclusions. * * *

The next points arising out of the special finding and conclusions of law relative thereto, and which are presented for our consideration, are as to the power of Samuel Gordon to mortgage and devise his moiety in the lands involved in this action. This will necessitate an examination, at least, of some of the features impressed by law upon these particular estates of joint tenancy, when they are once created. Tenants of this kind are said to hold individually and jointly, having one and the same interest, accruing through one and the same conveyance, commencing at the same time, and held by one and the same possession. Upon the death of one joint tenant, there being no severance in the estate, his entire interest is cast upon the survivor or survivors, to the exclusion of the inheritance of the same by his heirs. The interest of the survivor in the realty is consequently increased by the extinguishment of the interest of the tenant deceased. It is settled in law that a joint tenant may alienate or convey to a stranger his part or interest in the realty, and thereby defeat the right of the survivor. Tied. Real. Prop. § 238; 1 Washb. Real Prop. 682, cl. 22; 4 Kent, Comm. 460; 1 Prest. Est. 136; *Bevins v. Cline*, 21 Ind. 40; 6 Am. & Eng. Enc. Law, 892; 11 Am. & Eng. Enc. Law, 1092; *Duncan v. Forrer*, 6 Bin. (Pa.) 193.

In the ancient language of the law, joint tenants were said to hold *per my et per tout*, or, in plain words, "by the moiety or half and by all"; the true interpretation of this phrase being that these tenants were seised of the entire realty for the purpose of tenure and survivorship, while for the purpose of immediate alienation each had only a particular part or interest. Prest. Est. supra; 4 Kent, Comm. supra. Partition at common law could not be enforced by joint tenants, but under our statute partition of these estates may be enforced. Rev. St. 1881, § 1186 (Rev. St. 1894, § 1200). The interest of each tenant is subject to sale upon execution. *Thornburg v. Wiggins*, supra [135 Ind. 178, 34 N. E. 999]; *Freem. Ex'ns*, § 125.

Having these rights and powers at least over his interest in the land so held, there can be no sufficient reason urged why the power of the joint tenant to mortgage the same should be denied. Any interest in real estate which a person may sell and convey he may also mort-

* Part of the opinion is omitted.

gage. Jones, Mortg. § 136. We are therefore of the opinion that a joint tenant may mortgage his interest in the joint estate in like manner as though he were a tenant in common, and to the extent of the mortgage lien the right of the survivor will be destroyed or suspended, and the equity of redemption, at the death of the tenant, will be all that will fall to the surviving companion. This right of the tenant to mortgage is supported by the following authorities: York v. Stone, 1 Salk. 158; Simpson's Lessee v. Ammons, 1 Bin. (Pa.) 175, 2 Am. Dec. 425.

It is settled by numerous authorities that the devise under the will of Samuel Gordon, of his interest in the lands in question to appellant John H. Wilken, was inoperative and void, and the latter acquired no title thereby. The reason for this rule is apparent. Unless there is a severance during the lifetime of the devising tenant, at his death the right of the survivorship immediately accrues; and, as the devise cannot take effect until after the death of the testator, the tenant is thereby disqualified for devising his moiety in lands so held; or in other words, as this paramount right of the survivor or survivors instantly prevails upon the death of the testator, there remains no estate of inheritance upon which the will can operate. Swift v. Roberts, 3 Burrows, 1488; Duncan v. Forrer, *supra*; 4 Kent, Comm. *supra*. A joint tenant, being disqualified to exercise this power at common law, is also disqualified by our statute of wills. Section 2726, Rev. St. 1894 (section 2556, Rev. St. 1881), provides that persons may devise any interest descendible to their heirs which they may have in any lands, tenements, etc.

As we have seen that the interest of a joint tenant does not descend, it follows, therefore, that under this statute he has no right or power to devise the same by will. From the conclusions which we have reached herein, it is apparent that the court erred in holding, in its first conclusion, that the deed created a tenancy by entirety in Gordon and wife; that it also erred in holding, in its second conclusion, that the mortgage executed to appellant Herman Wilken by Samuel Gordon is void. The court did not err in stating its third and fourth conclusions of law. As, under the special finding of facts, the ultimate judgment against John H. Wilken is right; therefore the intervening errors complained of by him must be deemed and held to be harmless.

The judgment as against Herman Wilken is reversed, and the cause remanded, with instructions to the lower court to grant him a new trial, and leave to reform the issues if requested. The judgment as to John H. Wilken is affirmed. All concur.

II. Estates in Entirety *

THORNBURG v. WIGGINS.

(Supreme Court of Indiana, 1893. 135 Ind. 178, 34 N. E. 999, 22 L. R. A. 42, 41 Am. St. Rep. 422).

Appeal from circuit court, Randolph county; Leander Monks, Judge.

Action by Daniel S. Wiggins and wife against William H. Thornburg and others to enjoin a sale under execution. Demurrers to the complaint were overruled, and defendants appeal. Reversed.

DAILEY, J. This was an action instituted in the court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel Wiggins was the owner of a certain tract of real estate, therein described, containing 80 acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees a warranty deed, conveying to them the fee simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate, which they took and accepted, ever since have held, and now hold by entireties, and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the 24th day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were defendants below, recovered a judgment in the Randolph circuit court for the sum of \$403.70 and costs against one John T. Burroughs and the appellee Daniel S. Wiggins as partners doing business under the firm name of Burroughs & Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment, and placed in the hands of the appellant Thornburg, as sheriff of said county, and directed him to levy the same on said real estate, and that said sheriff did, on the 25th day of May, 1886, levy said execution on said real estate, or on the one-half interest in value thereof taken as the property of said appellee Daniel S. Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded, by the direction of said Howard and Gaston, to advertise said real estate for sale under said execution and levy to make said debt, and did on the 8th day of June advertise the same for sale on the 3d day of July, 1886, and will on said day sell the same unless restrained and enjoined from so doing by the court; that said Daniel S. Wiggins has no interest in said premises subject to sale thereon; that the appellees hold the title thereto as tenants by entireties, and not otherwise; that the sale of said tract on said execution would

* For discussion of principles, see Burdick, Real Prop. § 103.

cast a cloud on the appellees' title, etc. The second paragraph is the same as the first in substantial averments, except that in this paragraph the appellees set out as a part thereof a copy of the deed under which they claim title to said real estate as such tenants by entireties. The granting clause of the deed is as follows: "This indenture witnesseth that Lemuel Wiggins and Mary Wiggins, his wife, of Randolph county, in the state of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy," etc.

Appellants separately and severally demurred to each paragraph of the complaint, and their demurrers were overruled by the court, to which the appellants excepted, and, refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers. Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution.

A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent, in rents and profits; but upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him, and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, or years, or even in remainder. But the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation, and they cannot arise except by the instrument providing for such tenancy. *Griffin v. Lynch*, 16 Ind. 398. 9 Amer. & Eng. Enc. Law, 850, says: "Husband and wife are, at common law, one person, so that when realty vests in them both equally, * * * they take as one person; they take but one estate, as a corporation would take. In the case of realty, they are seised, not per my et per tout, as joint tenants are, but simply per tout; both are seised of the whole, and, each being seised of the entirety, they are called 'tenants by the entirety,' and the estate is an estate by entireties. * * * Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seised of the whole; the estate is inseverable, cannot be partitioned; neither husband nor wife can alone affect the inheritance; the survivor takes the whole." This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are at the time husband and wife, commonly called 'estates by entirety.'"

As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statute reenacts the common law. *Arnold v. Arnold*, 30 Ind. 305; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 474. Strictly speaking, estates by

entireties are not joint tenancies, (*Chandler v. Cheney*, 37 Ind. 391; *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64) the husband and wife being seised, not of moieties, but both seised of the entirety per tout, and not per my, (*Jones v. Chandler*, 40 Ind. 589; *Davis v. Clark*, supra; *Arnold v. Arnold*, supra.) It has been said by this court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants of the entirety. It is not even necessary that they be described as such, or their marital relation referred to. *Morrison v. Seybold*, 92 Ind. 302; *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. 167; *Dodge v. Kinzy*, 101 Ind. 102; *Hulett v. Inlow*, 57 Ind. 414, 26 Am. Rep. 64; *Chandler v. Cheney*, 37 Ind. 395. But the court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations in the conveyance which clearly indicate the creation of a different estate. *Hadlock v. Gray*, supra; *Edwards v. Beall*, 75 Ind. 401.

Having its origin in the fiction or common-law unity of husband and wife, the courts of some states have held that married women's acts extending their rights destroyed estates by entirety, but this court holds otherwise, (*Carver v. Smith*, 90 Ind. 226, 46 Am. Rep. 210) and the greater weight of authority is in its favor. Our decisions hold that neither alone can alienate such estate. *Jones v. Chandler*, supra; *Morrison v. Seybold*, supra. There can be no partition. *Chandler v. Cheney*, 37 Ind. 391. A mortgage executed by the husband alone is void, (*Jones v. Chandler*, 40 Ind. 588) and the same is true of a mortgage executed by both to secure a debt of the husband, (*Dodge v. Kinzy*, 101 Ind. 105) and the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it, (*State v. Kennett*, 114 Ind. 160, 16 N. E. 173.) A judgment against one of them is no lien upon it. *Ditching Co. v. Beck*, 99 Ind. 250; *McConnell v. Martin*, 52 Ind. 434; *Orthwein v. Thomas*, (Ill.) 13 N. E. 564. Upon the death of one, the survivor takes the whole in fee. *Arnold v. Arnold*, supra. The deceased leaves no estate to pay debts, (*Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577) and during their joint lives there can be no sale of any part on execution against either, (*Carver v. Smith*, supra; *Dodge v. Kinzy*, 101 Ind. 105; *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64; *Chandler v. Cheney*, supra; *Davis v. Clark*, supra; *McConnell v. Martin*, supra; *Cox's Adm'r v. Wood*, 20 Ind. 54.) The statutes extending the rights of married women have no effect whatever upon estates by entirety. *Carver v. Smith*, 90 Ind. 223, 46 Am. Rep. 210. Such estate is in no sense either the husband's or the wife's separate property. The husband may make a valid conveyance of his interest to his wife, because it is with her consent. *Enyeart v. Kepler*, 118 Ind. 34, 20 N. E. 539, 10 Am. St. Rep. 94.

The rule that husband and wife take by entirety was enacted in this territory in 1807, nine years before Indiana was vested with statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property with us for 86 years. Section 2922, Rev. St. 1881, provides that "all conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy." Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife. Under a statute of the state of Michigan, similar in all its essential qualities to our own, the court held that, "where lands are conveyed in fee to husband and wife, they do not take as tenants in common," (*Fisher v. Provin*, 25 Mich. 347;) they take by entirety. Whatever would defeat the title of one, would defeat the title of the other. *Manwaring v. Powell*, 40 Mich. 371. They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest; neither can be said to own an undivided half. *Insurance Co. v. Resh*, 40 Mich. 241; *Allen v. Allen*, 47 Mich. 74, 10 N. W. 113.

While the rule of entirety was predicated upon a fiction, the legislative intent in this state has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entirety have been preserved as between husband and wife, although joint tenancies between unmarried persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women. *Carver v. Smith*, 90 Ind. 227, 46 Am. Rep. 210. "Where a rule of property has existed for seventy years, and is sustained by a strong and uniform line of decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule is founded. Such a rule of property will be overruled only for the most cogent reasons, and upon the strongest convictions of its incorrectness. * * * It is evident that the legislature of 1881 did not intend to repeal the statutes establishing tenancies by entirety. They simply intended to enlarge in some particulars the power of the wife, which existed already under the Acts of 1852 and the years following. * * * It did not abolish estates by entirety as between husband and wife, but provided that when a joint deed was made to husband and wife they should hold by entirety, and not as joint tenants or tenants in common." *Carver v. Smith*, supra. In *Chandler v. Cheney*, 37 Ind., on page 396, the court says: "It was a well-settled rule at common law that the same form of words which,

if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted."

The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended. Where a contrary intention is clearly expressed in the deed, a different rule obtains. "A husband and wife may take real estate as joint tenants or tenants in common, if the instrument creating the title use apt words for the purpose." 1 Prest. Est. 132; 3 Bl. Comm., Sharswood's note; 4 Kent, Comm., side p. 363; 1 Bish. Mar. Wom. § 616 et seq.; Freem. Coten. § 72; Fladung v. Rose, 58 Md. 13-24. "And in case of devise and conveyances to husband and wife together, though it has been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common." Stew. Husb. & Wife, §§ 307-310; Tied. Real Prop. § 244. "And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise," etc., (*Hoffman v. Stigers*, 28 Iowa, 310; *Brown v. Brown*, 133 Ind. 476, 32 N. E. 1128, 33 N. E. 615) "so it seems that husband and wife may by express words be made tenants in common by gift to them during coverture," (*McDermott v. French*, 15 N. J. Eq. 80.)

In *Hadlock v. Gray*, 104 Ind. 599, 4 N. E. 167, a conveyance had been made to Isaac Cannon and Mary Cannon, who were husband and wife, during their natural lives, and the court say: "The language employed in the deed plainly declares that Isaac Cannon and Mary Cannon are not to take as tenants by entirety. The result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. * * * The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife." The court further say: "It is true that where real property is conveyed to husband and wife jointly, and there are no limiting words in the deed, they will take the estate as tenants in entirety. * * * But, while the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems quite clear upon principle that a grantor and his grantees may limit and define the estate granted by the one and accepted by the other, although the

grantees be husband and wife." The court then adopts the language of Washburn (1 Washb. Real Prop. 674) and Tiedeman, *supra*. In *Edwards v. Beall*, *supra*, the court hold that when lands are granted husband and wife as tenants in common they will hold by moieties, as other distinct and individual persons would do.

If, as contended by appellees, the rule prevail that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants, because by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties; joint tenancy would be superseded or put in abeyance by the estate created by law,—tenancy by entirety. The result of such reasoning would be to destroy the contractual power of the parties where this relationship between the grantees is shown to exist. Any other process of reasoning would carry the rule too far, and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy or in common, if appropriate language be expressed in the deed or will creating it; and we know of no more apt term to create a joint tenancy in the grantees in this estate than the expression "convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy." These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold not by entireties, but in joint tenancy. A joint tenant's interest in property is subject to execution. *Freem. Ex'ns*, 125.

Judgment reversed, with instructions to the circuit court to sustain the demurrer to each paragraph of the complaint.⁴

⁴ In accord with the preceding case, the weight of authority is to the effect that, if a grant to husband and wife shows an intention to create a joint tenancy or a tenancy in common, such intention will prevail. *Donegan v. Donegan*, 103 Ala. 488, 15 South. 823, 49 Am. St. Rep. 53 (1893); *Swan v. Walden*, 156 Cal. 195, 103 Pac. 931, 134 Am. St. Rep. 118, 20 Ann. Cas. 194 (1909); *Fladung v. Rose*, 58 Md. 13 (1882); *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762 (1895); *Isley v. Sellars*, 153 N. C. 374, 69 S. E. 279 (1910). Some cases, however, hold that, regardless of the terms used in the instrument, they will take an estate in entirety. *Wilson v. Frost*, 186 Mo. 311, 85 S. W. 375, 105 Am. St. Rep. 619, 2 Ann. Cas. 557 (1905); *Young's Estate*, 166 Pa. 645, 31 Atl. 373 (1895).

III. Tenancies in Common ⁵

CARVER v. FENNIMORE.

(Supreme Court of Indiana, 1888. 116 Ind. 236, 19 N. E. 103).

Appeal from circuit court, Madison county; D. Moss, Judge.

MITCHELL, J. Complaint by Esther J. Carver against Joseph Fennimore, in which the plaintiff alleged that the defendant was indebted to her in a specified sum for the one-third of the profit, use, and occupation of a certain lot or tract of land in the town of Alexandria, in Madison county. Issues were made which were tried to a jury, who returned a verdict for the defendant. The questions for decision will be understood by the following statement of facts:

In 1857, Ira K. Carver, the plaintiff's husband, was the owner of 80 acres of land adjoining the town of Alexandria, which he conveyed by a deed of general warranty to his brother, William Carver. The plaintiff's name was signed to the deed without her knowledge or consent, and she remained in ignorance of the conveyance until after the death of her husband, which occurred in April, 1875. She then learned of the conveyance, and that her signature appeared on the deed, whereupon, on the 26th day of February, 1876, she instituted a suit in the Madison circuit court against William Carver, and about 20 others, who claimed different parcels of the land as grantees under him, to set aside the deed, for possession, and to have the title to the land quieted in her. This suit was pending in the circuit court until April, 1879, when the plaintiff recovered a judgment and decree against all the defendants in that suit, establishing and quieting her title and right to the immediate possession of the undivided one-third of all the lands so conveyed, and for \$125 damages against William Carver. An appeal was taken to this court, where the judgment was afterwards affirmed on the 16th day of October, 1884. *Carver v. Carver*, 97 Ind. 497. William Perry owned the lot for the use and occupation of which the plaintiff seeks to recover in the present action, at the time the suit above mentioned was commenced, and he was duly summoned as a party thereto. Pending the suit, Perry conveyed by warranty deed to Mrs. Fadley, who made valuable improvements on the lot, and who, subsequently, in April, 1880, while the appeal was pending in this court, conveyed to the appellee, Fennimore. At the time the suit for possession was commenced the lot was unimproved, and the value of the use was merely nominal.

The question now is whether or not Fennimore is liable for the use and occupation of the land; and, if he is, whether or not the rental

⁵ For discussion of principles, see Burdick, Real Prop. § 104.

value is to be estimated according to the condition of the land prior and without reference to the improvements placed thereon by his grantor, pending the suit, or whether he must account for the value of the use of the land with the improvements. On behalf of the appellant, it is contended that the only defense the appellee was legally entitled to make was as to the rental value of the property as it was when he had possession of it; that the judgment and decree in the former case determined all questions as to the value of the improvements upon the real estate. It may be conceded that the former judgment and decree settled conclusively all questions concerning the ownership of the land and of the title to the improvements which had become a part of the freehold, whether such improvements existed thereon when the action was commenced, or were made pending the litigation. This concession, however, does not dispose of nor materially affect the questions for decision in the present case. The effect of the decree in the former suit was to declare and conclusively establish the fact that the appellant was the owner of an undivided one-third of the property in dispute, and that she was entitled to occupy the legal relation of tenant in common with those who claimed title to the lot under the deed of her deceased husband. That question is no longer open to debate; but the rights and obligations of the co-tenants, as such, in respect to the improvement or enjoyment of the common estate, have not been adjudicated.

The relation of tenant in common arises "where two or more persons are entitled to land in such a manner that they have an undivided possession, but several freeholds, i. e., no one of them is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with the others, or to receive his share of the rents and profits." Rap. & L. Law Dict. "Tenancy in Common." That one tenant may exclude the other from, or deny his title to, the common estate does not destroy the legal relation or the respective rights and remedies of co-tenants, if they be in fact owners in common; nor does a decree establishing and quieting the title of the excluded tenant necessarily determine the rights of the parties as regards an equitable accounting in an appropriate proceeding in respect to use and occupation, nor in respect of improvements made in good faith by the occupying tenant. *Carver v. Coffman*, 109 Ind. 547, 10 N. E. 567.

The decree conclusively establishes the fact of common ownership in the property, but it does not necessarily settle the equities between the parties growing out of the occupancy or improvement of the common estate. Notwithstanding the statute, (section 288, Rev. St. 1881,) which declares in effect that a tenant in common may maintain an action against his co-tenant for receiving more than his share or just proportion, the settled rule is that a co-tenant can only be compelled to account in case he has actually received rents from a third person,

or when he has entered upon and held exclusive possession of the whole estate in hostility to, and to the exclusion of, his co-tenant. *Humphries v. Davis*, 100 Ind. 369, and cases cited; *Carver v. Coffman*, supra, and cases cited; *Osborn v. Osborn*, 62 Tex. 495; *Edsall v. Merrill*, 37 N. J. Eq. 114; *Early v. Friend*, 16 Grat. (Va.) 21, 78 Am. Dec. 649, and note; *Kean v. Connelly*, 25 Minn. 222, 33 Am. Rep. 458.

It appears that the appellee and two grantors occupied the whole estate, denied the right of the appellant, and contested her claim to an interest in the common property. She is therefore entitled, within the rule above declared, to an accounting for her just proportion of the use and occupation of the lot in controversy. *Freem. Co-tenancy*, §§ 275, 276. The instructions of the court relevant to the features of the case above considered were substantially in consonance with the foregoing conclusions. In refusing an instruction asked by the appellant, and in the admission of evidence, the court proceeded upon the theory that the liability of the defendant was to be determined upon the basis of the rental value of the property in the condition it was prior to the making of the improvements thereon by the occupying claimants. This, the appellant contends, was an erroneous theory. The action by one co-tenant against another for an account for rents is a liberal and equitable action, and equitable defenses may be made; and in such a case, if the excluded tenant receives actual compensation for the damages sustained, he has no just ground of complaint. Unless, therefore, some peculiar circumstances are shown, the owner of an undivided interest in land, who occupies the whole estate in good faith, under claim and color of title to the whole, and has made permanent and valuable improvements under the mistaken belief that he is the owner of the whole estate, is accountable only for the fair rental value of the property in the condition in which it was when it went into his possession. The excluded owner or tenant is not, under ordinary circumstances, entitled to the enhanced rental value resulting from the improvements made with the capital of the bona fide occupant, or by his grantor from whom he purchased. *Morrison v. Robinson*, 31 Pa. 456; *Pickering v. Pickering*, 63 N. H. 468, 3 Atl. 744.

This rule is in analogy to that prescribed by the statute governing the rights and liabilities of occupying claimants, and has, besides, the support of reason and authority. *White v. Stuart*, 76 Va. 546-567; *Early v. Friend*, supra. The defendant and his grantor who made the improvements went into possession of the whole lot under a duly acknowledged and recorded deed, to which the plaintiff's name, as well as that of her husband, appeared to have been signed. It turned out that the plaintiff's signature thereto was without authority, and the persons in possession were the owners of only an undivided two-thirds of the property, after the death of the husband. It could hardly have been expected that they would surrender the whole lot upon

the institution of the suit by the plaintiff, notwithstanding the deed from Ira K. Carver and wife, which appeared to have been made in 1857; nor were they bound to leave the property lying idle, unproductive, and unimproved, and take the chance of paying an enhanced value for the improvements which resulted from their own enterprise. *Ford v. Knapp*, 102 N. Y. 135, 6 N. E. 283, 55 Am. Rep. 782. This results in no injustice to the plaintiff, while to adopt the measure of damages contended for would be inequitable and injurious to the defendant.

While a tenant in common who disseizes his co-tenant and makes improvements on the common estate may not be entitled to compensation for improvements so made, he is nevertheless entitled to have them considered when called to account in an equitable action for rents and profits. There are no circumstances disclosed in the present case which equitably entitle the appellant to the rental value of the land with the improvements. What the rights of the parties may be in respect to the improvements in any other proceeding than the present is not here considered or determined.

These considerations lead to an affirmance of the judgment. Judgment affirmed, with costs.

IV. Partition *

. See *Canfield v. Ford*, ante, p. 5.

V. Community Property †

BARNETT v. BARNETT.

(Supreme Court of New Mexico, 1897. 9 N. M. 205, 50 Pac. 337).

Appeal from district court, Bernalillo county; before Justice N. C. Collier.

Bill by Bessie Barnett against Joseph Barnett. From a decree in favor of plaintiff, defendant appeals. Reversed.

This is a suit brought by Bessie Barnett against Joseph Barnett for a partition or division; of all real and personal property standing in the name of or owned by appellant, and alleged to be community property, and acquired during the marriage relation formerly existing between the said parties. The said appellant procured a divorce from appellee on the 5th day of November, 1894, and this suit was brought

* For discussion of principles, see *Burdick*, Real Prop. § 108.

† For discussion of principles, see *Burdick*, Real Prop. § 109.

on the 13th day of January, 1896. Said bill of complaint alleges that appellant and appellee were married on or about the 10th day of August, 1891; that, at the time they were married, the appellant possessed and owned no property by inheritance, donation, or legacy during the existence of the marriage community, but that they did acquire a large amount of property, both real and personal, by their joint and separate efforts and labors, as set forth and described in the bill of complaint, and alleges that all said property is acquest and community property, and that appellee is entitled to one-half interest in and to the same. Appellant filed a demurrer to the said bill, which was overruled, and thereafter appellant filed an answer, and referred to and made the pleadings in the divorce suit a part thereof, and denied that the appellee was entitled to any interest in either the real or personal property.* * *

SMITH, C. J. (after stating the facts).⁹ It will not be contended that the appellee became vested with any separate interest under the common law in the property of the appellant acquired during their coverture, and it is not less assured that there is no provision made for her during his life as to such property by any statute of the territory. Chapter 90 of the Acts of 1889 is "An act to amend the laws relative to the estates of deceased persons," and directs that "one half of the acquest property which remains after the payment of the common debt shall be set apart to the surviving husband or wife absolutely." It is manifest that this distribution is derived from the Spanish law, and it may be that the limitation as to the time of the operation was suggested by the same code. It is consequential, therefore, that, if any laws have obtained here disposing (during the life of husband and wife) of the property accumulated by them during the continuance of their marriage relation, they are those of Spain and Mexico, as they existed, concerning descents, distributions, wills, and testaments, when this territory became a part of the United States.

In 1846 the following announcements were promulgated by Kearney in his Code: Kearney's Code, p. 82, § 1 (September 22, 1846): "All laws heretofore in force in this territory, which are not repugnant to or inconsistent with the constitution of the United States, and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this territory." Kearney's Code, Pamph. p. 35, § 1 (September 22, 1846): "The laws heretofore in force concerning descents, distributions, wills and testaments, as contained in the treatises on these subjects written by Pedro Murillo De Lorde (Velarde), shall remain in force so far as they are in conformity with the constitution of the United States and the state laws in force for the time being."

The following, as to the foregoing, was duly enacted and incorpo-

* Part of the statement of facts is omitted.

* Part of the opinion is omitted.

rated in the Compiled Laws of 1865 (Act July 14, 1851, Pamph. p. 176, § 6): "That all laws that have previously been in force in this territory that are not repugnant to, or inconsistent with the constitution of the United States, the organic law of this territory, or any act passed at the present session of the legislative assembly, shall be and continue in force, excepting in Kearney's Code the law concerning registers of land." Section 1, as above, of the Compiled Laws of 1865, is repeated in the Compiled Laws of 1884, as section 1365, as below: "Sec. 1365. The laws heretofore in force concerning descents, distributions, wills and testaments, as contained in the treatises on these subjects written by Pedro Murillo De Lorde (Velarde), shall remain in force so far as they are in conformity with the constitution of the United States and the state laws in force for the time being."

This sequence of proceeding, and the absence of other legislation on the subject until 1887, establish that the civil law as to descents, distributions, wills, and testaments obtained here in 1846, and prevailed continuously unmodified to the time of the passage of the "Act regulating descents and the apportionment of estates," approved February 24, 1887, and in force from its passage. This statute expressly repealed all laws in force contravening its provisions, but it does not positively or by implication affect during the lives of husband and wife the acquest property, or direct its disposition until the death of either. An act that became a law February 26, 1889, supersedes the statute of 1887, above cited, but is likewise silent as to acquest property as long as the members of the marital partnership are both alive, though divorced. In 1891, section 1365 of the Compiled Laws of 1884 was repealed as follows: "Be it enacted by the legislative assembly of the territory of New Mexico: Section 1. That section 1365 of the Compiled Laws of the Territory of New Mexico of 1884, relating to administrations, be and the same is hereby repealed."

Notwithstanding the inaptness of the phraseology of the above act, we will presume that its object was to repeal section 1365, and will consider it as though such effect were indisputable. If the laws concerning descents, distributions, wills, and testaments contained in the treatises on these subjects written by Pedro Murillo Velarde are not now in force, to the extent that they are not positively supplanted, the conclusion that there is not extant in the territory any provision as to the rights of husband and wife, while both are alive, to acquest property, is irresistible. The common law recognizes no interest in the wife during coverture because of separation. Our statutes are equally deficient as to such status, and inevitably the defendant in error is remanded to the civil law for protection, if she is worthy of it.

We will now inquire whether the civil law as to acquest property during the lives of the parties who have contracted marriage, and been divorced, has been abolished in New Mexico. It is a recognized tenet of international law that, in the annexation of new territory, its juris-

prudence as to rights—not political in character—of its people are acquired with it, and remain in force until substituted by action of the new sovereignty. Says Chief Justice Marshall, in *Insurance Co. v. Canter*, 1 Pet. 544, 7 L. Ed. 242: "It has been already stated that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force, until altered by the government of the United States. Congress recognizes this principle, by using the words 'laws of the territory now in force therein.' No laws could then have been in force but those enacted by the Spanish government." The same illustrious expounder, in *U. S. v. Percheman*, 7 Pet. 82, 8 L. Ed. 604, declares that "the people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed." In *Mitchel v. U. S.*, 9 Pet. 729, 9 L. Ed. 283, Mr. Justice Baldwin, delivering the opinion, announced "that, by the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed."

Mr. Justice Field, in *Railway Co. v. McGlinn*, 114 U. S. 546, 5 Sup. Ct. 1006, 29 L. Ed. 270, elaborates as follows: "It is a general rule of public law, recognized and acted upon by the United States, that, whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country—that is, laws which are intended for the protection of private rights—continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power (and the latter is involved in the former) to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity which are strictly of a

municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed."

That no statute of this territory—either that adopting the common law as the rule of practice and decision, or that relative to the estates of deceased persons, or any other enactment—ascertains the rights of husband and wife after legitimate separation, and during the lives of both, to the property of which they became possessed during coverture, has been shown; that a *casus omissus* has thus eventuated will be recognized; that any change of the Spanish law as to the acquist property under the foregoing status has been made cannot be seriously pretended; and that the foregoing authorities decisively establish that, in such contingency, the law upon the subject in operation at the date of the cession of the territory must prevail, should be unhesitatingly admitted. "Under the Spanish and Mexican law, property acquired by the husband and wife during the marriage, and whilst living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community; whilst property acquired by either by lucrative title solely constituted the separate property of the party making the acquisition. The fruits, profits, and increase of the separate property also belonged to the community. By 'onerous title' was meant that which was created by valuable consideration, as the payment of money, the rendition of services, and the like, or by the performance of conditions or payment of charges to which the property was subject. 'Lucrative title' was created by donation, devise, or descent." Platt, Prop. Rights Mar. Wom. § 7. "The wife, under the Mexican law, was clothed with the revocable and feigned dominion and possession of one-half of the property acquired by her and her husband during the coverture. 'During this period the husband is the head of the community, and the law invests him with discretionary power in all matters pertaining to its business or property. In fact, its business is conducted and its property acquired in his name, and his authority in the administration of its affairs is exclusive and absolute. The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property vests in the husband, and for all practical purposes he is regarded by the law as the sole owner. It is true, the wife is a member of the community, and is entitled to an equal share of the acquists and gains, but not so long as the community exists; her interest is a mere expectancy, like that which an heir possesses in the estate of an ancestor, and possesses none of the attributes of an estate, either at law or equity.'" Id. § 38.

It cannot be that the wife, being subordinate during coverture, becomes an equal, with equal rights as a *feme sole* to the property. Powerless during marriage, she must be divested absolutely by di-

vorce,—a termination of the marital rights in relation to the community property. It appears in "Practico de Testamento," published by Pedro Murillo De Velarde, as follows: "Sec. 12. Of the Surviving Consort. To the surviving consort the laws have conceded a certain right in the property of his consort, and at the same time have imposed upon him certain obligations, which it has seemed convenient to collect and explain in this section. First. The surviving consort has a right to the half of the ganancial (1) property acquired during matrimony. This right is based on the community or legal partnership existing between those married, as the civil effect of the marriage. It does not hold in case of divorce, because the consort who gave cause therefor loses the right to the ganancial property; nor in case of apostasy of either of them; and although, by ancient law, it was lost through the crime of treason, the penalty of confiscation, which followed from it, and was the cause of that loss, being abolished by our constitutional law, the right subsists. The widow who lives unchastely also loses it, in favor of the heirs of her husband."

Says Ballinger in his treatise on Community Property: "Upon the dissolution of the community by death or legal separation, the ganancias are to be divided equally." Says the same author: "The wife forfeits her matrimonial gains when she has been guilty of adultery or abandoned her husband without his consent." Says Schmidt in his publication of the law of Spain and Mexico, in article 68: "The wife loses her matrimonial gains in the following cases: (1) When she has been guilty of adultery; (2) when she has abandoned her husband without his consent; (3) when she has joined some religious sect, and then married or committed adultery." Says Hall in his work on Mexican Law (section 3081), in specifying those incapable of acquiring because of crime: "(4) The wife condemned as an adulteress in the life of her husband, if the question shall be of the succession of the legitimate children had by the marriage in which she committed the adultery."

It is apparent that the civil law is emphatic in its condemnation of the crime of adultery by the wife; that it is condign in the severity of its punishment for such an offense; and that the defendant in error must be one of the victims of its policy. That there has been no modification in the Spanish code of the requirement of fidelity by the woman in the marital relation, nor any abatement of the penalty imposed upon her for her dissoluteness, must be commended; but that it should be less exacting of the husband, and less proscriptive of him for his unchastity, seems a reproach that cannot be too vigorously denounced. That men, the lawmakers, should impose upon the other sex penalties for their misdeeds greater than those they attach to themselves for similar misconduct, is a gross prostitution of power, and a flagrant perpetration of a wrong that is a shame to them, and most pernicious in its demoralizing effects upon society. They who arrogate to themselves su-

periority, and assume to manufacture public sentiment, should not only refrain from invidious discrimination against women for the violation of their marital obligations, but should so exalt the standard of morality by scrupulous propriety and abstinence from impurity as husbands that they could, by example, demand fidelity from their wives. If men were constrained to purity in fealty to those to whom they have pledged themselves, the latter, in appreciative devotion, would be unyielding to temptation, and the relation of matrimony no longer a partnership increasing in frequency of dissolution.

We realize that we might have forbore the foregoing investigation, as we do not doubt that the plaintiff in error is impregnable in his defense of *res adjudicata*, but we have deemed it due to counsel to consider with care their respective contentions. It is wisdom that forbids the multiplication of litigation on the same subject, and spares suitors needless vexation in the determination of their rights. The parties to this controversy, having been separated by final decree of a court of competent jurisdiction, are estopped from further harassing each other as consorts in any other tribunal. The marital status having ceased absolutely, no rights which accrued in or by virtue of such relation, and were not asserted in the proceedings for dissolution, can be subsequently maintained. An absolute divorce, or a divorce a *vinculo matrimonii*, or from the bonds of marriage, absolutely dissolves all marriage ties, and destroys the relation of husband and wife. After the date of the decree the man has no wife, the woman no husband. The woman is a *feme sole*. A decree which dissolves the marriage absolutely, and destroys the marriage status, puts an end to all rights dependent upon coverture. After such a decree, the court has no jurisdiction over the parties, and the suit is no longer pending. When the court has entered the final decree, it has no further jurisdiction over the subject-matter, and cannot reassume it. * * *

CONDITIONAL OR QUALIFIED ESTATES

I. Estates upon Condition ¹

FRANK v. STRATFORD-HANDCOCK.

(Supreme Court of Wyoming, 1904. 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963.)

Error to District Court, Crook County; Richard H. Scott, Judge.

Action by S. Henrietta Carlile-Kent against Abe Frank and Grace E. McKenzie. There was a judgment for plaintiff and defendants brought error. Since the submission of the cause, defendant in error died, and Claude Stratford-Handcock, executor, and Mabel Stratford-Handcock, executrix and devisee, of her estate, were substituted. Reversed.

POTTER, J.² S. Henrietta Carlile-Kent sued the plaintiffs in error, Abe Frank and Grace E. McKenzie, for the specific performance of an alleged contract for the conveyance of certain lands situated in Crook county, entered into by Frank, the grantor of Mrs. McKenzie, and damages for taking and withholding possession of the premises. The allegations of the first cause of action are substantially that on April 4, 1901, Frank was the owner of the lands, and on that date entered into a written agreement with plaintiff, which is set out in *hæc verba*; that thereafter, and on the same day, plaintiff went into possession of the premises under the terms of the agreement, and remained in possession until July 26, 1901, when Mrs. McKenzie forcibly and wrongfully evicted her; that on September 20, 1901, plaintiff tendered the purchase price to defendant Frank, and demanded a deed, which was refused; that plaintiff has duly performed all the conditions of the agreement on her part to be performed, and brings the purchase price into court, and offers it to defendant Frank, upon his executing and delivering a conveyance according to the contract; and that on April 17, 1901, Frank wrongfully sold and conveyed the premises to the defendant McKenzie, who had full knowledge of the agreement between the plaintiff and Frank. The second cause of action is based upon the alleged wrongful eviction of plaintiff and the withholding of possession, and charges that the same occurred under the direction of the defendant Frank, and there are certain averments of special damages.

The agreement set out in the petition, and which was introduced in evidence, is in form a lease for the period of six months from April

¹ For discussion of principles, see Burdick, Real Prop. §§ 111-114.

² Part of the opinion is omitted.

1st, containing a clause giving the lessee, the plaintiff below, the right to purchase the premises at any time within said six months upon the payment of \$5,000, with interest at the rate of 8 per cent. per annum. The alleged right to specific performance is based on that clause. The plaintiff, as lessee, covenanted to pay as rental the taxes on the premises for the current year, 1901, to have the fences and buildings in good repair, and not to pasture upon a certain portion of the land, designated as "the bottom pasture," to exceed ten head of saddle and work horses and two milch cows. It was agreed that she should have full use of "back pasture" for her own stock, and that she should not have the right to turn stock upon the hay meadows, nor be allowed to pasture upon certain specified "ranches." It was also agreed that, in the event she should not purchase the premises within the time granted, one-half of the hay crop and one-third of the other crops raised on the land should belong to the lessor, Frank. The lease then concludes with the following provision: "It is further agreed that the party of the second part [the lessee] shall deposit with the party of the first part the sum of five hundred dollars for the faithful performance of this lease and the payment of the taxes as aforesaid." The paper is signed by both parties.

The answer not only denied the allegations of the petition as to the eviction of plaintiff, but averred that the latter had voluntarily delivered possession to the defendant McKenzie. There was some conflict of evidence on that issue, and the trial court determined it in favor of the plaintiff, expressly finding that on July 26, 1901, Mrs. McKenzie, with the consent and connivance of the defendant Frank, took possession of the premises against plaintiff's consent, and continued to withhold possession, and that plaintiff never voluntarily surrendered it. The point of conflict in the testimony was as to whether or not the plaintiff had voluntarily surrendered possession. Upon that question the finding of the trial court will be accepted, and, so far as material, the fact will be considered as established that Mrs. McKenzie took possession of the premises against plaintiff's consent. It is not denied that she continued in possession. In the view we are constrained to take of the case under the issues and proof: Frank's alleged connection with the act of Mrs. McKenzie in taking possession may not become material; but we deem it proper to say that the evidence totally failed to connect him with that act in any way, unless the fact that he had previously conveyed the land ought to be given that effect, which is at least doubtful. There is not the slightest evidence, outside the mere fact of his conveyance, that Frank either consented to or aided in the act of taking possession, or that he even knew of it until after it had occurred.

The remaining material averments of the answer are in substance and effect that the privilege given to the plaintiff to purchase the premises was without consideration, that there was lack of mutuality in the contract for the sale, and that the lease never became operative,

for the reason that plaintiff (the lessee) failed to make the deposit required by the contract for her faithful performance of the lease and the payment of the taxes, which it is alleged was a condition precedent to the acquirement of any right by the plaintiff under the lease. The reply met these averments, first, by a general denial; second, by alleging that the defendant Frank never demanded that the \$500 mentioned in the agreement be deposited with him; and, third, that said Frank never demanded of the plaintiff that she comply with any or all the terms of the agreement, and never notified plaintiff that she had violated any of such terms. The case was tried to the court on all the issues, and there was a separate statement of the conclusions of fact and law. * * *

Now, in the case at bar, the optional agreement does not recite a consideration; but it is contained in a written contract signed by the parties, and it is maintained on the part of defendants in error that the contract being a lease of the premises constituted a sufficient consideration for the agreement to convey, and it seems to be relied on as the sole consideration. On the other hand, it is contended that the contract never took effect or became operative as a lease, or for any other purpose, for the reason that the plaintiff neglected to perform a condition precedent to its operation, viz., the agreement to deposit \$500 as security for her faithful performance of the lease and the payment of the taxes. Hence it is insisted that the paper did not amount to a lease, and could not, therefore, be regarded as a proper consideration for the optional agreement, and that the lessor, Frank, revoked the agreement by the sale and conveyance of the premises to his codefendant, Mrs. McKenzie, which fact was brought to the knowledge of the plaintiff shortly thereafter, and before any acceptance on her part of the privilege of purchase. It becomes important, therefore, to consider the character of the agreement to make the deposit, and whether the failure to do so rendered the lease ineffective. There is no dispute upon the facts as to the deposit. It was neither made nor offered at any time; but, on the contrary, the plaintiff stated, after her eviction, and when her attention was called to her neglect to comply with her agreement to secure her performance of the terms of the lease by making a deposit of \$500, that she repudiated that part of the contract.

Conditions precedent are to be strictly complied with. Such a condition is one that must happen or be performed before the estate dependent upon it can arise or be enlarged, while a condition subsequent defeats the estate in case it does not happen or is not performed. In determining whether a particular provision amounts to a condition or not, the rule is that the intention of the grantor governs. Such intention is to be gathered from the whole instrument and the existing facts. The authorities lay down the principle that whether a condition is precedent or subsequent depends upon the intent of the parties, as collected

from the whole contract, whatever the order in which they are found, or the manner in which they are expressed, although certain words are customary when a condition rather than a covenant is intended. But it seems that the same words may be employed to create either a covenant or a condition. The words employed in the beginning of the instrument are words of present demise. It reads: "This article of agreement, made and entered into this 4th day of April, 1901, by and between Abe Frank, party of the first part, and S. Henrietta Carlile-Kent, party of the second part, witnesseth: That the party of the first part has this day leased to the party of the second part the following described lands [description] for a term of six months from April 1, 1901, and the party of the second part agrees to pay as rental of said premises the taxes on the same for the current year 1901." Then follows the clause giving the privilege of purchase, and following that are the other agreements as to the use of the premises, and the instrument then concludes with the agreement for the deposit that is quoted in an earlier part of this opinion.

The deposit was required for a specified purpose, viz., to secure the faithful performance by plaintiff, the lessee, of the lease, and the payment of the taxes. She had agreed to keep the fences and buildings in repair, to refrain from pasturing stock upon certain designated lands, and to limit her use of the premises in other respects; and the only rental was to be the taxes for the year, and a certain portion of the crops, should she not exercise the option of purchase. Now, we know, as the parties doubtless also knew, that the taxes would not become due or payable until a very short time before the expiration of the lease. The statutes require the tax list to go into the hands of the collector by the third Monday of September, and the taxes would not become delinquent until the last day of December. Indeed, the amount of the taxes could not have been ascertained until September. Here, then, is to be perceived a substantial reason for the requirement of security in advance. A reason is also to be found in the nature of the covenants of the plaintiff respecting the use to be made of certain parts of the premises, as well as to the keeping of the improvements in repair.

This would all indicate that the agreement for the security was intended as a condition, rather than a mere covenant. Moreover, as a covenant, it would have added nothing substantially to the contract. The damages that might be recovered upon its breach could not have exceeded the damages sustained by a breach of the covenants which it was intended to secure; and those damages would be as capable of recovery by assigning and proving a breach of the principal covenants. The very nature of the provision would seem to stamp it as a condition precedent. There would be little necessity for requiring security by a deposit of money after the time for performance of the lease had expired, and the lessee had enjoyed on her part all its benefits. As no time for making the deposit was stated, doubtless a reasonable time

would be implied, and, had the lessee been out of possession, a tender of the security and demand for possession within a reasonable time might no doubt have entitled her to possession under the lease. But no such question arises here. It was clearly proven, and so found by the court, that she was in possession at and prior to the making of the contract. There is nothing in the evidence to show that Frank did any act toward placing her in possession; nor is the title or right under which she had been in possession disclosed, except, perhaps, it may be inferred from a circumstance to which we shall have occasion to refer.

There is no question of waiver of the condition which we are permitted to consider. The pleadings set out a full compliance with all conditions, and the judgment of the court was based upon a finding that they had been substantially complied with. The reply, indeed, alleges that Frank did not demand the deposit; but he was not required to do so. There is no showing, however, as to that averment. The evidence is silent as to whether or not such a demand was made. But, when the plaintiff was charged with failing to furnish the security, she responded by saying that she repudiated that agreement. It is not disclosed, moreover, that Frank did anything toward recognizing the possession of the plaintiff, after the making of the contract, or that he did any act in relation to the property, except to sell and convey it to Mrs. McKenzie on April 17th; and after that the record is silent concerning him until his refusal of the tender of the purchase price September 20th, except that he appears to have been present at an interview between the plaintiff and Mrs. McKenzie, and their attorneys, after plaintiff had been evicted from the premises. But we think the question of waiver is not the case now before us. The trial court made no finding in that respect, and such an issue is not presented by the pleadings.

The above facts have been adverted to for the purpose of showing that nothing appears, even by the subsequent conduct of Frank, to indicate an intention to treat the agreement for security as anything other than a condition precedent to any right of the plaintiff to the premises under the lease. Similar provisions have, so far as we have been able to discover, been held to amount to conditions precedent.

In the English case of *John v. Jenkins*, 1 C. & M. (Exch.) 227, the lease there before the court contained words of present demise: "He, the said Esau Jenkins, lets this farm to David Jones," etc. But the following clause was contained in it: "David Jones is to give two sureties to answer for the rent." The court said that the provision as to sureties was very important, and showed that the instrument was never intended to operate as a lease at all events, but to operate as an agreement only, and that it was not to so operate, except security should be given for the rent by two sureties on the part of plaintiff; and, as no sureties were given, the instrument was for that reason, as well as others unnecessary to mention, held to be without effect,

and the plaintiff's possession was held to have been under the terms of a previous tenancy. In that case the plaintiff was in possession as tenant under a former agreement when the one in controversy was entered into.

In *McGaunten v. Wilbur*, 1 Cow. (N. Y.) 257, a house was hired on October 31st for six months from the 1st day of November following, for which the hirer agreed to pay \$150, \$50 to be paid in advance, and the residue to be secured by a bill of sale of his furniture in the nature of a mortgage. At the time of the hiring the hirer mentioned that he would not want possession for a fortnight. On the 3d of November the owner of the house, not having received the advance payment or security, rented it to another tenant. A few days later the first party tendered the \$50 and bill of sale, and demanded possession. It was held that as the tenancy under the agreement was to commence November 1st and the advance payment had not been made on that day, nor the security given, the owner had the right to consider the contract at an end, and let his house to any other person. To the same effect are the following cases: *Andis v. Personett*, 108 Ind. 202, 9 N. E. 101; *Hard v. Brown*, 18 Vt. 87. See, also, *Cassity v. Robinson*, 8 B. Mon. (Ky.) 279; *Stainton's Adm'r v. Brown*, 6 Dana (Ky.) 248; *Burlington & M. R. R. Co. v. Boestler*, 15 Iowa, 555.

It is impossible, therefore, to construe the provision in question as anything other than a condition precedent, and hence, until performed, the instrument was only an agreement for a lease; but, not having been performed, the lease did not become effective or binding upon the owner of the premises, and cannot be regarded as constituting a consideration for the optional agreement to convey. There is nothing in the fact of plaintiff's possession to change the situation. She was in possession at and before the signing of the contract, and there is no proof that Frank delivered possession to her. It is not perceived, therefore, upon what ground such possession can be regarded as imparting vitality to the lease. In the absence of any other showing, she would be but a mere tenant by sufferance. Rev. St. 1899, § 2772. The taking and keeping possession by the plaintiff, without more, was clearly not a part performance of the contract on her part. Possession is what she contracted to receive, not to give, and there is no opportunity or foundation in this case upon the record for the application of the principle that, when a party has voluntarily accepted the benefits of part performance, he may be precluded from insisting upon the performance of the residue as a condition precedent to his liability to pay for what he has received.

No doubt, has the lessor put the lessee in possession, that act might have indicated an intention not to treat the agreement for security as a condition precedent; and possibly the same intention might have been gathered from affirmative acts of the lessor in recognition of the possession and an existing tenancy under the contract. But there is no evidence of such acts on Frank's part. The evidence does dis-

close a notice served upon the plaintiff in the early part of July by Mrs. McKenzie, which seems to recognize in a way that plaintiff was holding under the lease, but asserted that she had not complied with its terms, and that the giver of the notice reserved the right to declare the lease forfeited. But Mrs. McKenzie was not a party to the contract, and we do not understand that she could, by recognizing the lease at that time and in that manner, render it effective, so as to make the obligation to convey binding upon Frank, her vendor. There is nothing to show that the latter advised or consented to the notice, or knew of it, and hence it can hardly be deemed persuasive of an intention on his part, or of the parties to the contract, to consider the contract as a present demise, and the provision as to security as a mere covenant.

We are constrained, therefore, to hold that the finding of substantial compliance with the terms of the contract is not sustained by the evidence. * * *

WARNER v. BENNETT.

(Supreme Court of Errors of Connecticut, 1863. 31 Conn. 468.)

SANFORD, J. In our opinion the conveyance from Tomlinson to Bennett and others was of a fee simple estate upon condition expressed in the deed. The instrument is a common deed of bargain and sale to the grantees, their heirs, and assigns forever, for certain uses specified in the deed, which contains the following clause: "The conditions of the within deed are such that whenever the within named premises shall be converted to any other use than those named within, and the within grantees shall knowingly persist in the use thereof for any purpose whatever except such as are described in said within deed, the said grantees forfeit the right herein conveyed to the within described premises, upon the grantor paying to the said Hatch and Bennett and other stockholders the appraised value of such buildings as may be thereon standing."

Blackstone says, estates upon condition "are such whose existence depends upon the happening or not happening of some uncertain event whereby the estate may be originally created or enlarged, or finally defeated." 2 Bl. Comm. 151. Littleton says, "It is called an estate upon condition because that the estate of the feoffee is defeasible if the condition be not performed." Co. Litt. § 325. "A condition is created by inserting the very word 'condition' or 'on condition' in the agreement." 1 Bouv. Inst. 285. Conditions are precedent or subsequent. "Precedent are such as must happen or be performed before the estate can vest or be enlarged. Subsequent are such by the failure or non-performance of which an estate already vested may be defeated." 2 Bl. Comm. 154. In the case of a condition "the estate or thing is given absolutely without limitation, but the title is subject to be divested by the

happening or not happening of an uncertain event. Where, on the contrary, the thing or estate is granted or given until an event shall have arrived, and not generally with a liability to be defeated by the happening of the event, the estate is said to be given or granted subject to a limitation." 2 Bouv. Inst. 275; 2 Bl. Comm. 155.

In the case before us the estate vested in the grantees upon the delivery of the deed, to have and to hold to them, their heirs and assigns, not until they should convert the property to other uses than those specified in the deed, nor so long as they should continue to use it for the purposes specified, but forever; with a proviso or condition expressed in the deed, that if they should convert the property to other uses they should forfeit their estate. The words employed are most appropriate and apt to make an express condition in deed. They are "the conditions of the within deed are such," etc. And in *Portington's Case*, 10 Coke, 41a, it is said that "express words of condition shall not be taken for a limitation." It has indeed been held that they may be so taken where the estate is limited over to a third person upon the breach or non-performance of the condition (*Fry's Case*, 1 Inst. 202) but there is no such limitation over in the case before us. So when it is said that "whenever the within named premises shall be converted to any other use," etc., "the grantees forfeit the right herein conveyed," it is clearly indicated that the estate thus forfeited by the misappropriation is to be cut off before the time originally contemplated for its termination by the parties.

But it is said that by the terms of the instrument the forfeiture depends not merely upon the misappropriation of the property by the grantees, but also upon the grantor's payment of the appraised value of the building. Suppose it is so, how can that affect the question whether this is a condition indeed or a limitation? No matter how many events the forfeiture depends upon, nor how many individuals must act in producing them, when all those events concur and co-exist the forfeiture is effected as completely as if it depended upon the occurrence of a single event, and the action or omission of a single individual. But the payment for the building was not an event upon which the forfeiture depended. It was merely a duty imposed upon the grantor by the contract in addition to that which the law imposed, to enable him to take advantage of the breach of condition and enforce the forfeiture. His legal obligation to enter for breach of the condition was in no wise affected by it. The estate conveyed by the deed was not an easement, or any other right or interest in the property less than a fee simple. The fact that the instrument was signed by both of the parties to it is of no importance. They were neither more nor less bound by the stipulations and conditions contained therein by reason of such signature. The instrument contains no contract on the part of the grantor to pay for the building. The provision upon that subject operates as a qualification of the grantor's right to enforce the forfeiture and regain his property, but operates in no other way. But for that

provision the estate granted could have been put an end to, and revested in the grantor, by an entry only; under that provision an entry could be made available only by payment for the building also.

We think it clear that the estate of the grantees was an estate on condition in deed, and that it was an estate upon condition subsequent; and hence, notwithstanding a breach of the condition by reason of which the estate might have been defeated, it must continue to exist in the grantees, with all its original qualities and incidents, until the grantor or his heirs by an entry (or its equivalent, a continual claim), have manifested in the way, required by law, their determination to take advantage of the breach of condition, to avail themselves of their legal rights, and to reclaim the estate thus forfeited.

The law upon this point is thus laid down by Professor Washburn, in the first volume of his treatise on Real Property (page 450), with accuracy and precision. "A condition, however, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. Notwithstanding its breach, the estate, if a freehold, can only be defeated by an entry made, and until that is done it loses none of its original qualities or incidents." See, also, *Id.* 452; 2 Bl. Comm. 155; 2 Cruise, Dig. 42.

But there is in this bill no allegation that an entry for condition broken was ever made. No right to maintain this suit is disclosed, no title to the property is set up, nothing is claimed but a right of entry for condition broken. And for this reason, if for no other, the bill is insufficient, and the decree must be pronounced erroneous.

The allegation in relation to an abandonment of the property is immaterial. It is not averred that the grantees had abandoned the property, but only that they had abandoned it "so far as the uses named in said deed are concerned;" that is, that they had ceased to use the property for the purposes for which the grant was made, not that they had ceased to use it altogether. What effect an absolute and entire abandonment of the property by the grantees would have had upon the legal or equitable rights of this petitioner, we are not now called upon to decide.

Secondly. A right of entry for condition broken is not assignable at common law, and we have no statute which makes it so. 2 Cruise, Dig. 4; 4 Cruise, Dig. 113; 1 Spence, Eq. Jur. 153; 1 Swift, Dig. 93. The grantor or his heirs only can enter for breach of such condition. 1 Washb. Real Prop. 451; 2 Cruise, Dig. 44. The petitioner therefore could have obtained no right or title to make an entry for breach of the condition, and without such entry the estate of the grantees could not be terminated, and no suit at law or in equity could be maintained against the occupant of the property.

Thirdly. If there was a breach of the condition and a forfeiture of the grantees' estate in consequence, and if a right of entry could be and was in fact assigned to the petitioner, still the petitioner could not obtain the relief for which he seeks in a court of equity, because that

court never lends its aid to enforce a forfeiture. 4 Kent, Comm. 130; 2 Story, Eq. Jur. § 1319; *Livingston v. Tompkins*, 4 Johns. Ch. (N. Y.) 415, 8 Am. Dec. 598.

Lastly. If the right, title or interest, whatever it was, of the grantor or his heirs was assignable, and was assigned to and vested in the petitioner, as he claims, he had no occasion to come into a court of equity for relief. We do not see why he might not have entered for breach of the conditions, requested the respondent to unite with him in procuring an appraisal of the building, if he refused, procured such appraisal without the respondent's co-operation, tendered the amount of the appraisal, and brought his action of ejectment. The petitioner's legal right, if he had it, to put an end to the grantees' estate and obtain possession of the property, we think could have been defeated by the respondent's refusal to co-operate in the appraisal or accept the tender. See 1 Swift, Dig. 295; Powell, Cont. 417. We know of no power in a court of equity to compel the respondent to join the petitioner in procuring an appraisal nor to make one, in such a case as this; and we see no occasion for the exercise of such a power if it exists. We think the petitioner has an adequate remedy for the enforcement and protection of all his rights at law.

There is manifest error in this record. In this opinion the other judges concurred, except DUTTON, J., who, having tried the case in the court below, did not sit.

HAYDEN v. STOUGHTON.

(Supreme Judicial Court of Massachusetts, 1827. 5 Pick. 528.)

Writ of entry. The parties stated the following case:

Lemuel Drake died seised in fee of the demanded premises and of several other parcels of land in Stoughton, in 1806. In his will, which was approved and allowed on the 5th of November in that year, the demanded premises were disposed of as follows: "I give to the town of Stoughton my lot of land in said town, which I bought of Ephraim Wales, (the land in controversy,) containing about eight acres; also about twenty five acres of woodland in said town, which I have bargained for of Elijah Belcher; and in failure of receiving a deed of said Belcher for said land, I give to said town three hundred dollars. Both of the above pieces of land (or money instead of the last piece) I give to said town for the purpose of building a schoolhouse for the use of a free grammar school (or other school), as said town may direct. Provided said schoolhouse is built by said town within one hundred rods of the place where the meetinghouse now stands." The testator gives a small legacy to a nephew and another to a niece, to be paid when they should respectively arrive at the age of eighteen years; but if either of them should die before that time, then the legacy should go to the use of the school. He also gives to the precinct in

Stoughton certain lots of land, part for a parsonage and part for the use of the ministry, but "if the meetinghouse is removed from the lot it now stands on, and no other built in its stead," then he gives these lots "to the use of the free school above mentioned." He appoints his wife executrix, and besides some specific devises to her, the will contains the following provision: "All the remainder of my estate, of what name or nature soever, or wherever the same may be found, I give and bequeath to my beloved wife, Abigail Drake, her heirs and assigns forever."

The demandants are part of the heirs at law of Abigail Drake, but not of Lemuel Drake.

On the 5th of May, 1806, the town of Stoughton voted to "accept the donation of Lemuel Drake, and to make provision for performing the conditions on their part, agreeable to the will of said deceased, as soon as the circumstances of the town will permit."

Abigail Drake died in 1806 intestate; and administration de bonis non with the will of Lemuel Drake annexed, was committed to Samuel Talbot, who on the 14th of March, 1817, delivered possession of the demanded premises to the town of Stoughton and accounted for the rent up to that time, and the town has occupied the premises ever since. But the town had not built any schoolhouse within one hundred rods of the meetinghouse before the commencement of this action.

The records of the town prior to the date of the writ, and reports of committees referred to in such records, were made part of the case. They showed that the subject of the donation had been frequently before the town, but it did not appear from them that the town had begun to perform the conditions of the devise. In 1818 the town voted "to take \$116 and one year's interest of the same (it being the rent of a meadow and the interest of a donation given to the town by Mr. Lemuel Drake, etc.) for the use of schooling the present year, and relinquish so much of the school money that is granted by the town the present year for schooling."

If on these facts and others appearing in the records and reports above mentioned, the town of Stoughton had forfeited the land demanded, and if the demandants were entitled to reclaim it, the tenants were to be defaulted; otherwise the demandants were to become non-suit.

PUTMAN, J. The first question which the case presents for decision is, whether the devise was upon a condition precedent or subsequent. We are all clearly of opinion that it was upon a condition subsequent, and that the estate vested immediately in virtue of the devise. The fee did not rest in abeyance until the schoolhouse should be built, but was to be forfeited if it should not be built in a reasonable time.

The next inquiry is, whether the devisees have forfeited the estate by reason of their not having built the schoolhouse, according to the condition of the devise. Where no particular time is mentioned for the performance of a condition subsequent, the law requires that it should

be done in a reasonable time. It is otherwise of conditions precedent, which are for the advantage of the party performing the first act. They may be performed at the will of the party and at such time as he pleases. Plowd. 16. But in the case at bar benefit was conferred presently by the devise of the estate. And the party entitled to have the estate upon a forfeiture is not to be bound by the mere will and pleasure of the devisees as to the time or manner of performing the condition, for that would in effect destroy the condition. They might never perform it. The devisees are therefore to perform in a reasonable, viz. a convenient time—"according to the nature of the thing to be done." Com. Dig. Condition, G, 5. A devise upon condition to pay debts; the debts must be paid in convenient time.

The devisees, by accepting this devise and entering into the land, undertook to build the schoolhouse in a convenient time within one hundred rods of the place where the meetinghouse then stood. It is said in Co. Lit. 208 b, that if one make a feoffment in fee, upon condition that the feoffee shall enfeof a stranger, and no time limited, the feoffee shall not have during his life to make the feoffment, for then he should take the profits in the mean time to his own use, which the stranger ought to have, and therefore he ought to make the feoffment as soon as conveniently he may; and so it is of the condition of an obligation.

The intent of the testator was, that the schoolhouse should be built at the place which he designated; not that the devisees should have the land without the charge. The building of the house is a local act, which the devisees should have performed, for the accomplishment of the benevolent design of the testator, in a convenient time. Upon the same reason as is said in Bothy's Case, 6 Co. 31, that where the act is local, and the obligor may perform it for the benefit of the obligee in his absence, there the obligor ought to do it in a convenient time. The house might be built by the devisees without the concurrence of any other party, so the case is not like that which is put, of a local act to be done with the concurrence of an obligor and obligee; in which case the obligor hath his lifetime to perform, unless hastened by request. It is clear to our minds, that the devisees were not at liberty to postpone the building at their own pleasure, but that they have forfeited the land, if they have permitted an unreasonable time to pass without performing the condition.

Of that the court must determine from the facts which are found. The will was proved in 1805. In 1806 the inhabitants voted to accept the estate and perform the condition—twenty years before the action was brought—and no schoolhouse has been built. The inhabitants of the town, during this long period, often met and passed votes contradictory and trifling, and still continuing to take the rents and profits of the land. They have omitted to do in that long period of time, what might have been done in a month as well as in a century. It seems to

us that they have not conformed to the manifest intention of the testator. They have forfeited the estate.

We are next to consider who are entitled to the estate upon its forfeiture. Does it belong to the heirs at law of the testator, or to the plaintiffs, who represent the residuary devisee, to whom the testator devised all the remainder of his estate of what name or nature soever, or wherever the same might be found?

In the construction of wills, the first and great object is to give effect to the intent of the testator, if it can be done without violating any rules of law. And it is a rule, that the heir at law is not to be disinherited, unless such appears clearly to be the intention of the devisor. If the devise of land should be void because the devisee is incapable of taking, and the devisor should give all his real estate not before disposed of, the land would be included in the residuary clause. It is said in Perkins, § 564, that in the case of a devise, the remainder shall not be avoided by the entry of the heir for the condition broken, because the will of the devisor shall be observed in as much as it may be.

So in *Benet v. French*, cited in *Sherewood and Nonne's Case*, 1 Leon. 251, where a man seised of lands devised a parcel called Gages to the erecting of a school, and all his other lands to French in fee, the devise of Gages was held void, because no person was named; and it was further holden, that it passed by the general words to French. I suppose the court construed it to mean other lands *not before devised*, because the Gages were not before devised, by reason of there being no devisee named who should take the land, and so passed to the residuary devisee. Upon the same principle, if the devisee die before the making of the will, the devise is void, and the land shall pass by the residuary clause. *Doe v. Sheffield*, 13 East, 526, where the testator devised land to the sisters of J. H. as tenants in common. There had been three sisters of J. H., but two died before the testator. He then gave all his messuages, lands, etc., not therein before disposed of, to Scott. And the court held, touching the point we are now considering, that if the surviving sister had not taken the whole, but only a third, the residuary devisee would have taken the two thirds, because the testator made no disposition of the two thirds, as the devisees of the two thirds died before the making of the will. It would not be considered as a valid devise, for the want of a devisee in existence at the time of making the will; and no better than if the devise had been of a particular estate to a monk; which would be void, and the remainder-man would take immediately, as the monk was not capable of taking at all. Perk. §§ 566, 567.

But where there was a devisee in existence, capable of taking the land, at the time when the will was made, but who should die before the will should be consummated by the death of the devisor, it would be considered as a lapsed devise. And in such case, inasmuch as the devisor had disposed of his whole interest in the land, if he had died immediately after making the will, the estate would have vested in the

devisee. The law supposes that the devisor did not contemplate or intend that the residuary clause or devise of all his land not before disposed of, should embrace land contained in the lapsed devise. The residuary clause touching real estate is to include all the interest of the devisor which he had not disposed of when the will was made, and the heir is not to be defeated on account of the contingency of the death of the devisee after the making of the will; which the devisor could not foresee.

It is true that in regard to personal property, the law allows the residuary legatee to take whatever shall eventually turn out not to be disposed of, whether it arise from accident or design. And the counsel for the plaintiffs have argued, that there is no good reason for the distinction, and that lapsed devises of real estate should go to the residuary devisee, as well as lapsed legacies of personal. There is however a marked difference in the effect of a will upon personal, and upon real property. The personal estate which is acquired after the will passes by the will, but real property acquired after the will does not pass, and is not affected by any disposition in a will made before its acquisition. The testator can devise only such real estate as he has at the time of making the will. The law upon this subject, viz. that the heir, and not the residuary legatee or devisee, shall have the advantage of lapsed devises, is now settled, and has been so held for more than half a century. *Doe v. Underdown*, Willes, 293, and the cases cited, particularly *Wright v. Hall*, cited in Willes, 299. In which last case Lord King says, "The testator makes his will as if he were to die that moment, and it cannot be presumed that he intended to devise a contingency which afterwards happened, (viz. the death of the devisee after the will and before the devisor,) and which he could not foresee."

So in *Gravenor v. Hallum*, Ambl. 645, the Lord Chancellor Cambden considers the law to be settled. So Lord Chancellor Hardwicke, in *Durour v. Motteux*, 1 Ves. Sen. 321. See also *Cambridge v. Rous*, 8 Ves. Jun. 25.

We are disposed to think this point settled, and upon as good reason certainly as the rule applicable to lapsed personal legacies.

But the devise under consideration cannot be viewed as lapsed. A lapsed devise is where the devisee dies after the making of the will and before the testator. But here the devisees remain as a corporation aggregate, and the estate vested in them as a conditional fee simple. It was not therefore technically a lapsed devise. We are now to consider the effect of it.

The third rule laid down by Chief Justice Willes in *Doe v. Underdown*, and which has been recognized in a late case of *Doe v. Scott*, 3 M. & S. 300, is, that when a testator has given away all his estate and interest in certain lands, so that if he were to die immediately nothing remains undisposed of, he cannot intend to give anything in these lands to his residuary devisee. That would be properly the case

of a lapsed devise of real estate, and the heir, and not the residuary devisee, shall have the benefit of it. The converse of that proposition, viz. that if the testator has not given away all his interest in the land, so that if he were to die immediately something would remain undisposed of, it is to be presumed that he intended to give the remainder in such lands to the residuary devisee, was the rule adopted in the case of *Doe v. Scott*; and that rule we think must be applied to the case at bar.

In *Doe v. Scott* the testator devised all his lands to J. M. and his heirs forever, provided that he or his heirs do within six months after the decease of the devisor assure certain premises to R. M. and his children, viz. to R. M. for life, and his children in fee; and he gave all the rest of his lands wheresoever, etc., to John and James Scott. J. M. and R. M. died after the making of the will and before the testator, bachelors. And the case was determined in favour of the Scotts the residuary devisees, on the ground, that there was no devise of the fee absolutely; for that if J. M. did not assure to R. M. for life remainder in fee to his children, there would be an interest in the devisor undisposed of by that devise, which would pass by the residuary clause. Lord Ellenborough, in delivering the opinion, states with approbation the rule laid down by Chief Justice Willes in *Doe v. Underdown*, that the intent of the testator is to be taken as things stood at the time when the will was made and that the devise must mean the rest and residue unbequeathed at the time of making the will.

Now we think the principle of that decision is exceedingly applicable to the case at bar. In this case, as in that, the devise was of a conditional and not of an absolute fee. There was a contingent interest which the devisor might have disposed of if he had pleased, to take effect upon the forfeiture of the estate; and he has in the residuary clause used words which are broad enough to pass the contingent interest. It is clear that the testator did not dispose of his whole interest to the inhabitants. The inhabitants might not choose to perform the condition, and so might forfeit their interest. The testator might have limited over that contingent interest specially. If he had done so, there can be no doubt but that it would have been a good limitation of his remaining interest. He made no limitation over. But nevertheless the devise did not lapse. The inhabitants became seised of the fee simple conditional, and the contingent interest not otherwise disposed of was disposed of by the residuary clause.

We have been greatly assisted in this investigation by the able and learned arguments of the counsel. The result of the whole is, that the devise to the inhabitants of Stoughton was upon a condition subsequent, and the estate vested accordingly; that they have forfeited the estate by neglecting to comply with the condition; that the testator had an interest undisposed of, depending upon the contingency of the performance or non-performance of the condition, which passes to the

residuary devisee; and that the plaintiffs claiming under her are entitled to recover.

The defendants must therefore be defaulted.*

II. Void Conditions ⁴

See Mann v. Jackson, post, p. 206.

III. Termination of Conditional Estates ⁵

See Warner v. Bennett, ante, p. 197.

IV. Who may Enforce Forfeitures ⁶

See Warner v. Bennett, ante, p. 197.

V. Estates upon Limitation ⁷

MANN v. JACKSON.

(Supreme Judicial Court of Maine, 1892. 84 Me. 400, 24 Atl. 886, 16 L. R. A. 707, 30 Am. St. Rep. 358.)

Report from supreme judicial court, Penobscot county.

Bill in equity by William E. Mann and another against Helen S. Jackson to obtain a construction of the will of William Mann, deceased.

WHITEHOUSE, J. This is a bill in equity brought for the purpose of obtaining a judicial construction of the following will:

"(1) I will that the money which may come from the policy of in-

* This case of Hayden v. Stoughton is cited by the court in Proprietors of Church in Brattle Square v. Grant, post, p. 212, and it is there said that this case "did not raise any question as to the remoteness of the gift over, because it there vested, according to the construction given to the will, within twenty years from the death of the testator and therefore within the prescribed period."

⁴ For discussion of principles, see Burdick, Real Prop. § 112.

⁵ For discussion of principles, see Burdick, Real Prop. § 113.

⁶ For discussion of principles, see Burdick, Real Prop. § 114.

⁷ For discussion of principles, see Burdick, Real Prop. § 115.

surance which I hold on my own life be appropriated to the payment and discharge of any and all mortgages then existing on my homestead house and lot on Cedar street, in said Bangor, so that said homestead may be free from all incumbrances, and any balance to be applied to pay any taxes then due or unpaid, on said homestead, and any balance to go with my other estate.

"(2) My said homestead house and lot aforesaid I give and devise to my unmarried daughter, Helen S. Mann, for and during her natural life, unless she shall be married, in which case her life estate shall cease. So long as she shall live and remain unmarried she is to have the exclusive right of occupation, use, and enjoyment of said homestead, but subject to the duty of keeping it in good repair at her expense, and paying all taxes and keeping the property well insured. If all parties interested see fit to sell the property, they may do so, in which case said Helen is to receive the net income from the proceeds of sale, the same to be well invested for that purpose; and, if the buildings are burned in whole or part, the insurance money shall be applied to repair or rebuild, unless all agree to a different appropriation of the money, viz., all parties interested.

"(3) All other estate, real and personal, of all kinds, which I may own or possess at death, including the remainder of my homestead house and lot aforesaid, my farm on the 'Odlin Road,' so called, and all other property, I give in equal shares to my three children, William E. Mann, Mrs. Augusta S. Harden, and Helen S. Mann, to have and to hold the same to them, and their heirs and assigns, forever."

After the death of the testator, Helen S. Mann married, and is the defendant in this suit.

The language of the second item of the will is specially brought in question. The plaintiff says that the defendant's "life estate" in the homestead was terminated by her marriage, while the defendant contends that the clause limiting her exclusive title by her marriage is void, as being a condition in restraint of marriage, and that she is entitled to the sole use and occupation of the homestead during her natural life.

It is undoubtedly an established rule of law that, even with respect to devises of real estate, a subsequent condition which is intended to operate in general and unqualified restraint of marriage, or the natural effect of which is to create undue restraint upon marriage and promote celibacy, must be held illegal and void, as contrary to the principles of sound public policy. It appears from the early English cases that this doctrine was borrowed by the English ecclesiastical courts from the Roman civil law, which declared absolutely void all conditions in wills restraining marriage, whether precedent or subsequent, whether there was any gift over or not. But the courts of equity found themselves greatly embarrassed between their anxiety on the one hand to follow the ecclesiastical courts, and their desire on the other to give more heed to the plain intention and wish of the testator

as manifested by the whole will. Thereupon the process of distinguishing commenced for the purpose of preventing obvious hardships arising from the application of that technical rule to particular cases. As a result there has been ingrafted upon the doctrine a multitude of curious refinements and subtle distinctions respecting real and personal estate, conditions and limitations, conditions precedent and conditions subsequent, gifts with and without valid limitations over, and the application of the rule to widows and other persons. Indeed, it may be said of the decisions upon this subject with even more propriety than was observed by Lord Mansfield in regard to another branch of law, that "the more we read, unless we are very careful to distinguish, the more we shall be confounded."

The whole subject as to what conditions in restraint of marriage shall be regarded as valid and what as void would seem to be involved in great uncertainty and confusion both in England and in this country. There is clearly discernible, however, through all the decisions of later times, an anxiety on the part of the judges to limit as much as possible the rule adopted from the civil law. "The true rule upon the subject is," says Mr. Redfield, "that one who has an interest in the future marriage and settlement of a person in life may annex any reasonable condition to the bequest of property to such person, although it may operate to delay or restrict the formation of the married relation, and so be in some respect in restraint of marriage.

* * * Where there are hundreds of conflicting cases upon a point, and no general principle running through them by which they can be arranged or classified, what better can be done than to abandon them all, and fall back upon the reason and good sense of the question, as the courts have of late attempted to do?" 2 Redf. Wills, *290, § 20, and note. See, also, *Id.* 297, and 2 Jarm. Wills, 569. Beyond the general proposition first stated, the cases seem finally to resolve themselves for the most part into the mere judgment of the court upon the circumstances of each particular case. 2 Redf. Wills, *297, § 31; 2 Pom. Eq. Jur. 933; *Coppage v. Alexander's Heirs*, 2 B. Mon. (Ky.) 313, and note to same, 38 Am. Dec. 153.

But the rule was so far modified and relaxed that conditions annexed to devises and legacies restraining widows from marrying have almost uniformly been pronounced valid. 2 Pom. Eq. Jur. *supra*. From the numerous decisions upon the subject in the United States, the conclusion is fairly to be drawn that such conditions will be upheld in the case of widows, whether there is a gift over or not. 2 Jarm. Wills, p. 564, note 29; 2 Redf. Wills, 296; Schouler, Wills, 603. See, also, recent cases of *Knight v. Mahoney*, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573, and *Nash v. Simpson*, 78 Me. 142, 3 Atl. 53.

In 2 Redf. Wills, 296, the author says: "We apprehend there is no substantial reason, either in law or morals, why a man should be

allowed to annex an unreasonable condition in restraint of marriage, one merely in terrorem, in case of a wife, more than of a child or any other person, in regard to whose settlement in life he may fairly be allowed to take an interest; but the cases certainly, many of them, maintain such distinction."

It is unnecessary, however, to enter upon an elaborate discussion of the subject. The existence of the rule as recognized in *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281, is not here questioned. In that case the rule was applied to a "crude and ill-defined" proviso in a deed of real estate. We have no occasion to question the soundness of that decision. It was the judgment of the court upon a particular set of words in that deed. It is not an authority to control the judgment of the court respecting the construction of an entirely different set of words in a testamentary gift of real estate.

There is a recognized distinction between conditions in restraint of marriage annexed to testamentary dispositions, and restraints on marriage contained in the very terms of the limitation of the estate given.

In *Heath v. Lewis*, 3 De Gex, M. & G. 954, (1853,) a testator made a gift of £30 a year to an unmarried woman during the term of her natural life, "if she shall so long remain unmarried." Lord Justice Knight Bruce said: "It must be agreed on all hands that it is, by the English law, competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that, if such a legatee shall marry, the annuity would thereupon cease. 'During the term of her natural life, if she so long remain unmarried,' is the technical and proper language of limitation, as distinguished from a condition."

Lord Justice Turner said: "It may either be a gift for life defeated by a condition, or it may be a gift to her so long as she remains unmarried, that is, for life, if she be so long unmarried; and the question is therefore purely one of intention, in which of the two senses the words were used."

Jones v. Jones, 1 Q. B. Div. 279, (1876,) is an important authority. It related to a devise of real estate, the testator's language being as follows: "Provided said Mary remains in her present state of single woman; otherwise, if she binds herself in wedlock she is liable to lose her share of the said property immediately, and her share to be possessed by the other parties mentioned." Blackburn, J., said: "A number of cases have been referred to, from which it appears that the courts of equity have adopted from the ecclesiastical or civil law, it is unnecessary to say to what extent, the rule that conditions in general restraint of marriage are invalid. The attempt to escape from the consequences of this rule led to decisions in which a great many nice distinctions were established as to whether the bequest amounted

to a condition or only a limitation. If this point had been as to a bequest of personal estate, it would have been necessary to look at these decisions. But this is a devise of land which is governed by the rules of the common law, and it is admitted that there is no case which extends the rule as to conditions or limitations to devises of land. There is, I admit, strong authority that, when the object of the will is to restrain marriage and promote celibacy, the courts will hold such a condition to be contrary to public policy, and void. But here there appears to be no intention to promote celibacy. Now here, I think, when one sees the scope of the testator's dispositions, it comes to this: 'I have left to three women enough to live upon, and if one of them dies I bring in Jemima and Mary. But if Mary (I suppose as the youngest she was most likely to change her state) happens to marry, her husband must maintain her, and her share shall pass to the rest.' Now, if he had said this in express words, could it have been contended that his provision was contrary to public policy? I think not. It is admitted that the limitation to Mary until she marries is perfectly good, but it is said that here, because the disposition is in the form of a condition, it is bad."

Lush, J., said: "We ought to take the words in such a sense as to carry out the object of the testator, unless it is illegal; and, as I read the words, the testator only meant to provide for her while she was unmarried. There is nothing in these words which compels us to think it was the testator's object that this niece should never marry at all; he probably supposed that she would be maintained by her husband, and did not mean to provide for husband and wife." See, also, *Holtz's Estate*, 38 Pa. 422, 80 Am. Dec. 490; *Cornell v. Lovett's Ex'rs*, 35 Pa. 100; *Graydon v. Graydon*, 23 N. J. Eq. 230; *Courter v. Stagg*, 27 N. J. Eq. 305.

It is the enlightened policy of courts of equity, when not restrained by compulsory rules, to seek to discover the intention of the testator from the whole instrument, rather than from any particular form of words.

In the case before us, the testator makes careful provision in the first item of the will for the appropriation of so much of the proceeds of his life insurance as might be necessary to discharge all mortgages on the homestead. In the second item he devises the homestead to his unmarried daughter "for and during her natural life, unless she shall be married, in which case her life estate shall cease. So long as she shall live and remain unmarried she is to have the exclusive right of occupation, use, and enjoyment of said homestead." In case all parties interested agree to a sale of the property, this daughter is to receive the net income of the proceeds, "the same to be well invested for that purpose;" and, in the event of the destruction of the buildings by fire, the insurance money shall be applied in rebuilding

them. In the third item he gives the residue, including the remainder of his homestead, to his three children in equal shares.

Here, then, is the case of a parent who has a recognized right, and was under a moral obligation, to interest himself in the settlement of his daughter. To the ordinary mind, untrammelled by the "mediaevalism of the law," there is nothing in the will indicating any other thought or feeling than an affectionate regard for the welfare and happiness of a beloved daughter, and an anxious desire to provide for her a permanent and comfortable home. The modern court, free from the incubus of arbitrary legal dogmas, must fail to discover in the language of this will any suggestion of a purpose on the part of the father to impose a condition in terrorem in restraint of his daughter's marriage. It discloses no other disposition than a praiseworthy desire to secure to the daughter the continued occupation and enjoyment of the old homestead until, by reason of her marriage, she should cease to need it; then she was to share equally with her sister and brother in the entire estate. It is manifest from the whole tenor of the will that nothing was more remote from the real purpose of the testator than the idea of discouraging the marriage of this daughter. The intention was not to promote celibacy, but simply to furnish support until other means should be provided. Because of the inadvertent use by the scrivener of the word "unless," this court is not compelled to impose upon this instrument an intention which it is manifest from the context the testator never had. There is no such inflexible rule; the rights of the parties are not to be determined by an application of such a Procrustean method. The provision is in no respect *contra bonos mores*. It is not violative of any principle of sound policy; and, if it is here necessary and proper to recognize and maintain the distinction between a limitation and a condition subsequent, the language of this will should be held to constitute a valid limitation, and not an illegal condition.

The defendant's exclusive right to the possession and enjoyment of the entire homestead ceased upon her marriage. Decree accordingly.

PETERS, C. J., and VIRGIN, LIBBEY, EMERY, and FOSTER, JJ., concurred.

VI. Estates upon Conditional Limitation *

PROPRIETORS OF THE CHURCH IN BRATTLE SQUARE v. GRANT.

(Supreme Judicial Court of Massachusetts, 1855. 3 Gray, 142, 63 Am. Dec. 725.)

Bill in equity by the Proprietors of the Church in Brattle Square, praying for leave to sell the parsonage house in Court Street, held by them under the following devise in the will of Lydia Hancock: "I give and bequeath unto Messrs. Timothy Newell, Isaac Smith and Ebenezer Storer, present deacons of the Church of Christ in Brattle Street in Boston, whereof the Rev. Mr. Samuel Cooper is minister, and to their successors in that office, all that brick dwelling-house and land situated in Queen Street, lately improved by my honored father, Daniel Henchman, Esquire, as his mansion house, to hold the same, at and immediately upon the decease of my mother, unto said Timothy Newell, Isaac Smith and Ebenezer Storer, and to the deacons of the said church for the time being, forever, upon this express condition and limitation, that is to say, that the minister or eldest minister of said church shall constantly reside and dwell in said house, during such time as he is minister of said church; and in case the same is not improved for this use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew, John Hancock, Esquire, and to his heirs forever." The said John Hancock was also made residuary devisee. The will was dated October 30th, 1765, and proved in the probate court in the 21st of November, 1777.

The bill alleged that from the decease of Mrs. Hancock the minister or eldest minister of said church had constantly dwelt and resided in said house, during such time as he was minister of said church, and the house and land had been improved for that use only; that the sum assessed for taxes upon said estate had been and was continually increasing, and the estate required, and would from time to time require, the expenditure of large sums of money to keep it in repair; that a sale of the estate was necessary to the beneficial accomplishment of the intent of the devise; that the present deacons of the church, who now hold the legal estate in the premises, were unwilling to join in making sale thereof without the sanction and decree of this court, because John Hancock and others, heirs at law of the John Hancock named in the will, pretended that the estate was devised upon the limitation and condition that the minister or eldest minister of said church should constantly dwell and reside in said

* For discussion of principles, see Burdick, Real Prop. § 116.

house during such time as he should be minister of said church, and that in case the same should not be improved for that use only, the testatrix ordered that the said house and land should revert to her estate, and gave and devised the same to the said John Hancock and to his heirs forever, and so, if the said house and land should be sold, the same would be forfeited and would revert to the heirs of the said John Hancock; but the plaintiffs charged the contrary thereof to be the truth, and that the devise was not upon any such condition or limitation, and that the supposed devise over to said Hancock was altogether void and of no effect; and that, if any forfeiture of said estate could or should at any time be worked, the legal title would not vest in the heirs of said John Hancock, but in certain other persons, heirs at law of the testatrix; and that if the estate, should, in the opinion of this court, be deemed to have been devised and to be still holden by said deacons upon any such limitation or condition, a sale of the estate had become necessary and expedient to effect the objects of the trust, as contemplated by the testatrix.

The deacons and minister of the church, John Hancock and others, heirs of John Hancock named in the will, and the heirs at law of the testatrix, were made parties to the bill. The bill prayed for a discovery, for a decree for a sale of the estate and an investment and application of the proceeds in such manner as should best effect the objects of the trust, and for further relief.

John Hancock and William H. Spear, two of the heirs at law of John Hancock named in the will, filed answers, in which they alleged that the condition and limitation of the devise under which the plaintiffs held was valid; two other heirs of said John Hancock demurred on the ground that they were improperly made parties; and all the other defendants suffered the bill to be taken for confessed.

BIGELOW, J. The interesting and important questions involved in the present case are now for the first time brought to our consideration. In a suit in equity between the same parties which was pending several years ago in this court, we were not called upon to give any construction to the clause in the will of Lydia Hancock, under which the deacons of the church in Brattle Square and their successors hold the estate now in controversy. The object of that suit was widely different from that of the present. The plaintiffs then assumed, by implication, that they were bound by the "condition and limitation" annexed to the devise, and the validity of the gift over on breach of the condition was not called in question by them. The single purpose then sought to be accomplished was to obtain authority to sell the estate, solely on the ground that, from various causes, the occupation and use of the premises for a private dwelling, and especially for a parsonage, in the manner prescribed in the will, had become onerous and impracticable; and the prayer of the bill was that, if a sale was authorized, the proceeds might be invested in other real

estate, to be held on the same trusts and upon the like condition and limitation as are set out and prescribed in the will of the testatrix, relative to the estate therein devised to the deacons and their successors. It is quite obvious that, on a bill thus framed, no question could arise concerning the respective titles of the parties to the suit, under the devise. They were not put in issue by the pleadings, and no decision was in fact made in regard to them. That suit was determined solely upon the ground that the case made by the plaintiffs was not such as to warrant the court in making a decree for a sale of the premises upon the reasons and for the causes alleged in that bill, and above stated.

The case is now brought before us upon allegations and denials which directly involve the construction of the devise, and render it necessary to determine the respective rights of the devisees and heirs at law to the estate in controversy. In order to decide the questions thus raised, it is material to ascertain, in the outset, the legal nature and quality of the estate which is created by the terms of the devise to Timothy Newell and others, deacons of the church in Brattle Street. If the gift had been solely to the deacons of the church in Brattle Street and their successors forever, without any condition annexed thereto concerning its use and occupation, it would, without doubt, have vested in them the absolute legal estate in fee. By the provincial statute of 28 G. 2, which was in force at the time of the death of the testatrix, the deacons of all Protestant churches were made bodies corporate, with power to take in succession all grants and donations, both of real and personal estate. Anc. Chart. 605. The words of the devise were apt and sufficient to create a fee in the deacons and their successors, and they were legally competent to take and hold such an estate. It therefore becomes necessary to consider the nature and effect of the condition annexed to the gift; how far it qualifies the fee devised to the deacons and their successors; and what was the interest or estate devised over John Hancock and his heirs forever, upon a failure to comply with and perform the condition. It will aid in the solution of these questions, if we are able in the first place to determine, with clearness and accuracy, within what class or division of conditional and contingent estates the devise in question falls.

Strictly speaking, and using words in their precise legal import, the devise in question does not create simply an estate on condition. By the common law, a condition annexed to real estate could be reserved only to the grantor or deviser, and his heirs. Upon a breach of the condition, the estate of the grantee or devisee was not ipso facto terminated, but the law permitted it to continue beyond the time when the contingency upon which it was given or granted happened, and until an entry or claim was made by the grantor or his heirs, or the heirs of the deviser, who alone had the right to take advantage of a breach. 2 Bl. Com. 156; 4 Kent, Com. (6th Ed.) 122,

127. Hence arose the distinction between a condition and a conditional limitation. A condition, followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it, is termed a conditional limitation. A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the devisor. (A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest.) Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. If it were otherwise, it would be in the power of the heir to defeat the limitation over, by neglecting or refusing to enter for breach of the condition. This distinction was originally introduced in the case of wills, to get rid of the embarrassment arising from the rule of the ancient common law, that an estate could not be limited to a stranger, upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry of claim.

There is a further distinction in the nature of estates on condition, and those created by conditional limitation, which it may be material to notice. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains, after the gift or grant takes effect, continues in the grantor, and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate, by the same instrument, passes out of the grantor or devisor. The first estate vests immediately, but the expectant interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno flatu*; and being an ultimate disposition of the entire fee, as well after as before the breach of the condition, there is nothing left in the grantor or devisor or his heirs. The right or possibility of reverter, which, on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation which is to take effect on the breach of the condition.

✓ One material difference therefore, between an estate in fee on condition and on a conditional limitation, is briefly this; that the former

leaves in the grantor a vested right, which, by its very nature, is reserved to him, as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is not liable to the objection of violating the rule against perpetuities, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates, so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. (The limitation over being executory, and depending on a condition, or an event which may never happen, passes no vested interest or estate.) It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect.

Bearing in mind these distinctions, it is obvious that the devise in question was not the gift of an estate on a condition merely, but it also created a limitation over, on the happening of the prescribed contingency, to a third person and his heirs forever. It was therefore a conditional limitation, under which general head or division may be comprehended every limitation which is to vest an interest in a third person, on condition, or upon an event which may or may not happen. Such limitations include certain estates in remainder, as well as gifts and grants, which, when made by will, are termed executory devises. and when contained in conveyances to uses, assume the name of springing or shifting uses. 1 Preston on Estates, §§ 40, 41, 93; 4 Kent, Com. (6th Ed.) 128, note; 2 Fearn, Cont. Rem. (10th Ed.) 50; 1 Pow. Dev. 192, and note 4; 1 Shep. Touch. 126.

That the devise in question does not create a contingent remainder in John Hancock and his heirs is very clear, upon familiar and well established principles. There is, in the first place, no particular estate upon the natural determination of which the limitation over is to take

effect. (The essence of a remainder is, that it is to arise immediately on the termination of the particular estate by lapse of time or other determinate event, and not in abridgment of it.) Thus a devise to A. for twenty years, remainder to B. in fee, is the most simple illustration of a particular estate and a remainder. The limitation over does not arise and take effect until the expiration of the period of twenty years, when the particular estate comes to an end by its own limitation. So a gift to A. until C. returns from Rome, and then to B. in fee, constitutes a valid remainder, because the particular estate, not being a fee, is made to determine upon a fixed and definite event, upon the happening of which it comes to its natural termination. But if a gift be to A. and his heirs till C. returns from Rome, then to B. in fee, the limitation over is not good as a remainder, because the precedent estate, being an estate in fee, is abridged and brought to an abrupt termination by the gift over on the prescribed contingency. One of the tests, therefore, by which to distinguish between estates in remainder and other contingent and conditional interests in real property, is, that where the event, which gives birth to the ulterior limitation, determines and breaks off the preceding estate before its natural termination, or operates to abridge it, the limitation over does not create a remainder, because it does not wait for the regular expiration of the preceding estate. 1 Jarman on Wills, 780; 4 Kent, Com. 197. Besides, wherever the gift is of a fee, there cannot be a remainder, although the fee may be a qualified or determinable one. The fee is the whole estate. When once granted, there is nothing left in the donor but a possibility or right of reverter, which does not constitute an actual estate. 4 Kent, Com. 10, note; *Martin v. Strachan*, 5 T. R. 107, note; 1 Jarman on Wills, 792. All the estate vests in the first grantee, notwithstanding the qualification annexed to it. If, therefore, the prior gift or grant be of a fee, there can be neither particular estate nor remainder; there is no particular estate, which is an estate less than a fee; and no remainder, because, the fee being exhausted by the prior gift, there is nothing left of it to constitute a remainder. Until the happening of the contingency, or a breach of the condition by which the precedent estate is determined, it retains all the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee. The prior estate may continue forever, it being an estate of inheritance, and liable only to determine on an event which may never happen. For this reason, the rule of the common law was established, that a remainder could not be limited after a fee. In the present case, the devise was, as we have already stated, a gift to the deacons and their successors forever; and they being by statute a quasi corporation, empowered to take and hold grants in fee, it vested in them, *ex vi termini*, an estate in fee, qualified and determinable by a failure to comply with the prescribed con-

dition. The limitation over, therefore, to John Hancock and his heirs could not take effect as a remainder.

It necessarily results from these views of the nature and quality of conditional and contingent estates, as applicable to the devise in question, that the limitation of the estate over to John Hancock and his heirs, after the devise in fee to the deacons and their successors, is a conditional limitation, and must take effect, if at all, as an executory devise. The original purpose of executory devises was to carry into effect the will of the testator, and give effect to limitations over, which could not operate as contingent remainders, by the rules of the common law. (Indeed, the general and comprehensive definition of an executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder.) Every devise to a person in derogation of, or substitution for, a preceding estate in fee simple, is an executory devise. 4 Kent, Com. 264; 1 Jarman on Wills, 778; Lewis on Perp. 72; 6 Cruise, Dig. tit. 38, c. 17, §§ 1, 2; *Purefoy v. Rogers*, 2 Saund. 388a, and note. Thus a limitation to A. and his heirs, and if he die under the age of twenty one years, then to B. and his heirs, is an executory devise, because it is a limitation of an estate over after an estate in fee. This, by the rules of the ancient common law, would have been void, for the reason that they did not permit any limitation over after the grant of a previous fee. Whenever, therefore, a devisor disposes of the whole fee in an estate to one person, but qualifies this disposition, by giving the estate over, upon breach of a condition, or happening of a contingency, to some other person, this creates an executory devise. 4 Kent, Com. 268; 6 Cruise, Dig. tit. 38, c. 17, § 2; Bac. Ab. Devise, I; 1 Fearn, Cont. Rem. 399.

In the case at bar, the devise is to the deacons and their successors in this officer forever. By itself, this gave to them an absolute estate in fee simple; but the gift in fee was qualified and abridged by the condition annexed, and by the limitation over to John Hancock and his heirs. From the rules and principles which we have been considering, it would seem to be very clear that the devise in question did not create an estate on condition, because the entire fee passed out of the devisor by the will; no right of entry for breach of the condition was reserved, either directly or by implication, to herself or her heirs, but upon the prescribed contingency it was devised over to a third person in fee. It did not create an estate in remainder, because there was no particular estate which was first to be determined by its own limitation before the gift over took effect, and because, the prior gift being of the entire fee, there was no remainder, inasmuch as the prior estate might continue forever. It did create an executory devise, because it was a limitation by will of a fee after a fee, which, by the rules of law, could not take effect as a remainder.

This being the nature of the devise to John Hancock and his heirs,

it remains to be considered whether there is anything, in the nature of the gift over, which renders it invalid, and if so, the effect of its invalidity upon the prior estate devised to the deacons and their successors. Upon the first branch of this inquiry, the only question raised is, whether the gift over is not made to take effect upon a contingency which is too remote, as violating the well established and salutary rule against perpetuities. Executory devises in their nature tend to perpetuities, because they render the estate inalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. They cannot be aliened or barred by any mode of conveyance, whether by fine, recovery or otherwise. 4 Kent, Com. 266; 2 Saund. 388 a, note. Hence the necessity of fixing some period beyond which such limitations should not be allowed. It has therefore long been the settled rule in England, and adopted as part of the common law of this commonwealth, that all limitations, by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator, and twenty one years afterwards, as a term in gross, or, in case of a child en ventre sa mere, twenty one years and nine months, are void as too remote, and tending to create perpetuities. 4 Kent, Com. 267; 1 Jarman on Wills, 221; 4 Cruise, Dig. tit. 32, c. 24, § 18; *Nightingale v. Burrell*, 15 Pick. 111. See, also, *Cadell v. Palmer*, 1 Cl. & Fin. 372, 421, 423, which contains a very full and elaborate history and discussion of the cases on this subject. In the application of this rule, in order to test the legality of a limitation, it is not sufficient that it be capable of taking effect within the prescribed period; it must be so framed as *ex necessitate* to take effect, if at all, within that time. If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of the prescribed period, the limitation is void. The object of the rule is to prevent any limitation which may restrain the alienation of property beyond the precise period within which it must by law take effect. If the event upon which the limitation over is to take effect may, by possibility, not occur within the allowed period, the executory devise is too remote, and can not take effect. *Nightingale v. Burrell*, 15 Pick. 111; 4 Kent. Com. 283; 6 Cruise, Dig. tit. 38, c. 17, § 23. These rules are stated with great precision in 2 Atkinson on Conveyancing (2d Ed.) 264.

The devise over to the heirs of John Hancock is therefore void, as being too remote. The event upon which the prior estate was to determine, and the gift over take effect, might or might not occur within a life or lives in being at the death of the testatrix, and twenty one years thereafter. The minister of the church in Brattle Square, it is true, might have ceased constantly to reside and dwell in the house, and it might have been improved for other purposes, within a year after the decease of the testatrix; but it is also true that it may be

occupied as a parsonage, in the manner prescribed in the will, as it has hitherto been during the past seventy-five years for five hundred or a thousand years to come. The limitation over is not made to take effect on an event which necessarily must happen at any fixed period of time, or even at all. It is not dependent on any act or omission of the devisees, over which they might exercise a control. It is strictly a collateral limitation, to arise at a near or remote period, uncertain and indeterminate, and contingent upon the will of a person who may at any time happen to be clothed with the office of eldest minister of the church in Brattle Square. It is difficult to imagine an event more indefinite as to the time at which it may happen, or more uncertain as to the cause to which it is to owe its birth.

The more common cases of limitations by executory devise, which are held void, as contravening the rule against perpetuities, are when property is given over upon an indefinite failure of issue, or to a class of persons answering a particular description or specifically named; as to the children of A who shall attain the age of twenty-five, or to a person possessing a certain qualification, with which he will not be necessarily clothed within the prescribed period. So gifts to take effect upon the extinction of a dignity, by failure of the lives of persons to whom it is descendable (*Bacon v. Proctor*, Turn. & Russ. 31; *Mackworth v. Hinxman*, 2 Keen, 658), or depending on the contingency of no heir male or other heir of a particular person attaining twenty one, no person being named as answering that description (*Ker v. Lord Dungannon*, 1 Dru. & War. 509), are held invalid, as being too remote. So, too, in a case more analogous to the present, where the testator devised lands to trustees, and directed the yearly rents, to a certain amount then fixed and named in the will, to be appropriated for certain charitable purposes; and provided that, in the event of there being a new letting, by which an increase of rents was obtained, the surplus arising from such increase should go to the use and behoof of the person or persons belonging to certain families, who, for the time being, should be lord or lords, lady or ladies, of the manor of Downpatrick; and in case the said families did not protect the charities established by the will, or if the said families should become extinct, then the said surplus rents were to be appropriated to said charities, in addition to the former provisions for the charity; it was held that the gift over of the surplus rents to the trustees for the charity was too remote, as the contingency upon which it was to take effect was not restricted to the proper limits. *Commissioners of Charitable Donations v. Baroness De Clifford*, 1 Dru. & War. 245, 253.

In this case Lord Chancellor Sugden says: "This is a clear equitable devise of a fee qualified or limited; a fee in the surplus rents for this family, so long as they shall be lords and ladies of the manor of Downpatrick, 'in case,' (and I must here read the words 'in case' as if they were 'whilst,' or 'so long as,') certain persons protect the

almshouse, etc.; and thus the limitation would assume the same character as that which is so familiar to us all, viz., while such a tree shall stand, or the happening of any other indifferent event. Such being my opinion with respect to the estate devised to these families, I must hold the gift over void. The law admits of no gift over, dependent on such an estate; a limitation after it is void, and cannot be supported; otherwise, it would take effect after the time allowed by law."

It is difficult to distinguish that case from the one at bar. The contingency of the families neglecting to protect the charities established by the will, in that case, was no more remote than that of the failure or omission of the minister of the church for the time being to reside and dwell in the house, as is prescribed by the will in the present case. Either event might take place within the prescribed period, but it might not until a long time afterwards. It can make no difference in the application of the case cited, that it was the gift of an equitable fee simple, because the limits prescribed to the creation of future estates and interests are the same at law and in equity. *Lewis on Perp.* 169; 4 Cruise, Dig. tit. 32, c. 24, § 1; *Duke of Norfolk v. Howard*, 1 Vern. 164.

But it is quite unnecessary to seek out analogies to sustain this point, as we have a direct and decisive authority in the case of *Welsh v. Foster*, 12 Mass. 97. It was there held, that a limitation, in substance the same as that annexed to the devise in the present case, being made to take effect when the estate should cease to be used for a particular purpose, was void, for the reason that it contravened the rule against perpetuities. That was the case of a grant by deed, with a proviso that the estate was not to vest "until the millpond [on the premises] should cease to be employed for the purpose of carrying any two mill-wheels;" and it was adjudged that the rule was the same as to springing and shifting uses created by deed, as that uniformly applied to executory devises in order to prevent the creation of inalienable estates. The limitation was therefore held invalid, as depending on a contingency too remote.

The true test, by which to ascertain whether a limitation over is void for remoteness, is very simple. It does not depend on the character or nature of the contingency or event upon which it is to take effect. These may be varied to any extent. But it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law, within which the gift over must take effect. Applying this test to the present case, it needs no argument or illustration to show that the devise over to John Hancock and his heirs is upon a contingency which might not occur within any prescribed period, and is therefore void, as being too remote.

The remaining inquiry is as to the effect of the invalidity of the devise over, on account of its remoteness, upon the preceding gift in fee to the deacons and their successors forever. Upon this point

we understand the rule to be, that if a limitation over is void by reason of its remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. Therefore a gift of the fee or the entire interest, subject to an executory limitation which is too remote, takes effect as if it had been originally limited free from any divesting gift. The general principle applicable to such cases is, that when a subsequent condition or limitation is void by reason of its being impossible, repugnant or contrary to law, the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised; if for life, then it takes effect as a life estate; if in fee, then as a fee simple absolute. 1 Jarman on Wills, 200, 783; Lewis on Perp. 657; 2 Bl. Com. 156; 4 Kent, Com. 130; Co. Lit. 206 a, 206 b, 223 a.

The reason on which this rule is said to rest is, that when a party has granted or devised an estate, he shall not be allowed to fetter or defeat it, by annexing thereto impossible, illegal or repugnant conditions or limitations. Thus it has been often held, that when land is devised to A. in fee, and upon the failure of issue of A., then to B. in fee, and the first estate is so limited, that it cannot take effect as an estate tail in A., the limitation over to B. is void, as being too remote, because given upon an indefinite failure of issue, and the estate vests absolutely in fee in A., discharged of the limitation over. So it was early held, that where a testator devised all his real and personal estate to his wife for life, and after her death to his son and his heirs forever, and in case of the death of the son without any heir, then over to the plaintiff in fee, the devise over to the plaintiff was void, and the son took an absolute estate in fee. *Tilbury v. Barbut*, 3 Atk. 617; *Tyte v. Willis*, cas. temp. Talb. 1; 1 *Fearne*, Cont. Rem. 445. So, too, if a devise be made to A. and his heirs forever, and for want of such heirs then to a stranger in fee, the devise over to the stranger would be void for remoteness, and A. would take a fee simple absolute. *Nottingham v. Jennings*, 1 P. W. 25; 1 *Pow. Dev.* 178, 179; 2 *Saund.* 388 a, b; 1 *Fearne*, Cont. Rem. 467; *Attorney General v. Gill*, 2 P. W. 369; *Busby v. Salter*, 2 *Preston's Abstracts*, 164; *Kampf v. Jones*, 2 *Jeen*, 756; *Ring v. Hardwick*, 2 *Beav.* 352; *Miller v. Maccomb*, 26 *Wend. (N. Y.)* 229; *Ferris v. Gibson*, 4 *Edw. Ch. (N. Y.)* 707; *Tator v. Tator*, 4 *Barb. (N. Y.)* 431; *Conklin v. Conklin*, 3 *Sandf. Ch. (N. Y.)* 64.

Such indeed is the necessary result which follows from the manner in which executory devises came into being and were engrafted on the stock of the common law. Originally, as has been already stated, no estate could be limited over after a limitation in fee simple, and in such case the estate became absolute in the first taker. This rule was afterwards relaxed in cases of devises, for the purpose of effectuating the intent of testators, so far as to render such gifts valid by way of executory devise, when confined within the limits prescribed

to guard against perpetuities. If a testator violated the rule by a limitation over which was too remote, the result was the same as if at common law he had attempted to create a remainder after an estate in fee. The remainder would have been void, and the fee simple absolute would have vested in the first taker. 6 Cruise Dig. tit. 38, c. 12, § 20; Co. Lit. 18 a, 271 b.

The rule is, therefore, that no estate can be devised to take effect in remainder after an estate in fee simple; but a devise, to vest in derogation of an estate in fee previously devised, may under proper limits be good by way of executory devise. If, after a limitation in fee by will, a disposition is made of an estate to commence on the determination of the estate in fee, the law, except in the case of a devise over to take effect within the prescribed period, presumes the estate first granted will never end, and therefore regards the subsequent disposition as vain and useless. Shep. Touch. (Preston's Ed.) 417. It makes no difference in the application of this rule, that the condition on which the limitation over is made to depend is not mala in se. It is sufficient that it is against public policy. Thus in a recent case where estates were limited to A. for ninety-nine years, if he should so long live, remainder to the heirs male of his body, with a proviso that if A. did not during his lifetime acquire a certain dignity in the peerage, the gift to his heirs male should be void, and the estate should go over to certain other persons, it was held that this conditional limitation was made to depend upon a condition which was against public policy and therefore void, and that the estate vested in the eldest son of A. as heir male, discharged of the gift over. *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1.

So in the case at bar, the limitation over being upon an event which is too remote, and for that reason contrary to the policy of the law, cannot take effect. The estate therefore in the deacons and their successors remains unaffected by the gift over the John Hancock and his heirs. The doctrine on this point is briefly and clearly stated in the Touchstone: "No condition or limitation, be it by act executed, limitation of a use, or by devise or last will, that doth contain in it matter repugnant, or matter that is against law, is good. And therefore, in all such cases, if the condition be subsequent, the estate is absolute and the condition void; "and the same law is for the most part of limitations, if they be repugnant, or against law, as is of conditions" in like cases. Shep. Touch. 129, 133. See also 4 H. L. Cas. 160.

It is undoubtedly true that this construction of the devise defeats the manifest purpose of the testatrix, which was, on a failure to use and occupy the premises as a parsonage in the manner described in the will, to give the estate to John Hancock and his heirs. But no principle is better settled than that the intent of a testator, however clear, must fail of effect, if it cannot be carried into effect without a violation of the rules of law. 1 Pow. Dev. 388, 389.

It is to be borne in mind, however, in this connection, that the claim set up by the heirs at law of the testatrix to the premises in controversy is in direct contravention of the clear intent of the will, by which they are studiously excluded from any share or interest whatever in this estate. All that she did not specifically devise is given by residuary clause to John Hancock. Her heirs therefore can claim only by virtue of an arbitrary rule of law; and it certainly more accords with the general intent of the testatrix, that the absolute title in this estate should, by reason of the invalidity of the gift over, be vested in the deacons and their successors, who were manifestly the chief objects of her bounty in this devise, than in her heirs at law, whom she so carefully disinherited. The court will not construe a conditional limitation as a mere condition, and thus defeat the estate first limited, in a mode not contemplated by the testatrix.

Nor can the estate in question pass by the residuary clause. The testatrix having specifically devised the entire estate to the first taker, and upon the happening of the contingency over, to another person, could not have intended to include it in the gift of the residue. She had given away all her estate and interest in the property, and nothing remained to pass by the residuary clause. 2 Pow. Dev. 102-104; *Hayden v. Stoughton*, 5 Pick. 538. It is not like a case of a gift on a valid condition, where the right or possibility of reverter remains in the donor or devisor, which would pass under a residuary clause, or in case of intestacy, to the heirs of the donor; but it is the case of a devise in fee on a conditional limitation over, which is void in law. There is therefore no possibility or right of reverter left in the devisor, which can pass to heirs or residuary devisees, and the limitation over being illegal and void, the estate remains in the first takers, discharged of the divesting gift.

Nor does it make any difference in the application of this well settled rule of law to the present case, that the testatrix in terms declares that the gift to the deacons and their successors shall be void, if the prescribed condition be not fulfilled. The legal effect of all conditional limitations is to make void and terminate the previous estate upon the happening of the designated contingency, and to vest the title in those to whom the estate is limited over by the terms of the gift or grant. The clause in the will, therefore, which declares the gift void in the event of a breach of the condition, and directs that the premises shall revert to her estate, does not change the nature of the estate, nor add any force or effect to the condition which it would not have had at law, if no such clause had been inserted in the will. It is simply a conditional limitation. The condition, being accompanied by a limitation over which is void in law, fails of effect, and the estate becomes absolute in the first takers. It could not revert to her estate, because there was no reversion left, the whole estate being limited over by the same devise. Such reversion could only exist in

case of a simple condition, as we have already seen; and no such reverter can take place where the condition is accompanied by a limitation over.

Besides, and this perhaps is the more satisfactory view of a devise of this nature, the condition operates only as a limitation, the rule being that when an estate is given over upon breach of a condition, and the same is devised by express words of condition, yet it will be intended as a limitation only. In all cases where a clause in a will operates as a condition to a prior estate, and a limitation over of a new estate, the condition takes effect only as a collateral determination of the prior estate, and not strictly as a condition. Therefore a limitation on a condition or contingency is not a condition; a clause creating contingent remainders or executory gifts by devise is properly a limitation, and though it be in such terms as to defeat another estate by way of shifting use or executory devise, still it is strictly speaking a limitation. 2 Cruise Dig. tit. 16, c. 2, § 30; Shep. Touch. 117, 126; 1 Vent. 202; Carter, 171.

The case of *Austin v. Cambridgeport Parish*, 21 Pick. 215, cited and relied upon by the defendant Hancock, is widely different from the case at bar. That was a grant by deed of an estate, defeasible on a condition subsequent which was legal and valid. The possibility of reverter was in the grantor and his heirs or devisees; the residue of the estate was vested in his grantee, the parish. The two interests united made up the entire fee simple estate, and were vested in persons ascertainable and capable of conveying the entire estate. There was nothing, therefore, in that case which resembled a perpetuity, or restrained the alienation of real property. The conditional estate in the parish, and the possibility of reverter in the devisees of the grantor, were vested estates, and interests capable of conveyance, and constituting together an entire title or estate in fee simple. This is very different from an executory devise, where only the conditional estate is vested, and the persons to whom the limitation over is made are uncertain and incapable of being ascertained until the prescribed contingency happens, however, remote that event may be. No conveyance of such an estate, by whomsoever made, could vest a good title, because it can never be made certain, until after a breach of the condition, in whom the estate is to vest. Besides, in that case there was nothing illegal or contrary to the policy of the law, in the creation of the estate by the original grantor.

The case of *Hayden v. Stoughton*, 5 Pick. 528, to which reference has also been made, did not raise any question as to the remoteness of the gift over, because it there vested, according to the construction given to the will, within twenty years from the death of the testator, and, therefore, within the prescribed period. In the case of *Brigham v. Shattuck*, 10 Pick. 306, the court expressly avoid any decision on

the validity of the devise over, and decide the case upon the ground that the demandant had no title to the premises in controversy.

The result, therefore, to which we have arrived on the whole case is, that the gift over to John Hancock is an executory devise, void for remoteness; and that the estate, upon breach of the prescribed condition, would not pass to John Hancock and his heirs, by virtue of the residuary clause, nor would it vest in the heirs at law of the testatrix. But being an estate in fee in the deacons and their successors, and the gift over being void, as contrary to the policy of the law, by reason of violating the rule against perpetuities, the title became absolute, as a vested remainder in fee, after the decease of the mother of the testatrix, in the deacons and their successors, and they hold it in fee simple, free from the divesting limitation.

A decree may therefore be entered for the sale of the estate, as prayed for in the bill, and for a reinvestment of the proceeds for the objects and purposes intended to be effected by the trusts declared in the will respecting the property in question.

VII. Modified Fees *

1. BASE OR DETERMINABLE FEES

LYFORD v. CITY OF LACONIA.

(Supreme Court of New Hampshire, 1909. 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. [N. S.] 1062, 139 Am. St. Rep. 680.)

Exceptions from Superior Court, Belknap County.

Proceedings by the City of Laconia to condemn land for the enlargement of the public library park and lot. There was a judgment awarding compensation, and Stephen K. Lyford brings exceptions. Overruled.

Appeal, from the assessment of damages by the city council of Laconia for land taken under the power of eminent domain for the enlargement of the public library, park, and lot. The land in question is located at the corner of Main and Church streets, and at the time of the taking was occupied by the Congregational Church Society with a house of public worship. The appellant was awarded \$1 damages. His appeal was heard by the county commissioners, who awarded him the same sum. He thereupon claimed a trial by jury. At the close of his evidence, the court (Wallace, C. J.) ruled, subject to exception, that he could recover no more than nominal damages and ordered judgment for him for \$1.

* For discussion of principles, see Burdick, Real Prop. § 117.

The appellant claimed title to the premises as the grandson and only heir of Stephen C. Lyford, who in 1837 gave the Congregational Society a deed of the land in question. In consideration of \$100, the deed purports to convey to the Society, their successors and assigns forever, a certain parcel of land, giving the boundaries. Immediately after the description of the land are the following clauses: "Said Society to hold said premises as long as they occupy the same with a house of public worship and no longer, and when they cease to so occupy said premises, then the same shall revert to me and my heirs. To have and to hold the said granted premises, with all the privileges and appurtenances to the same belonging, to said society and their assigns, to them and their only proper use and benefit forever." The deed concludes with the ordinary covenants of the warranty form. The Society at once took possession under their deed and occupied with a house of public worship until after the land was taken by the city. Damages were awarded by the city council to the society, and no appeal was taken. * * * ¹⁰

PARSONS, C. J. * * * ¹¹ It is not necessary to decisively determine the effect of Stephen's deed. On either view taken by counsel, the result is the same. The defendants interpret the deed as giving to the society an estate upon condition subsequent that they should occupy the land with their house of public worship; their title being liable to be defeated by breach of the condition and entry by the grantor or his heir. The plaintiff contends that the deed created in the society "what is technically known as a base, qualified, or determinable fee," which determined when the society ceased to occupy the land with a house of public worship. He concedes that if the society held the land upon condition subsequent, the further compliance with the condition being prevented by act of the law, the society would hold the land discharged of the condition, and that he has no interest for which damages could be awarded. *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350. This case upon which the concession is based does not, however, require it. In that case there was a conveyance of land upon the express condition that it should be used for a burial ground and for no other purpose. Subsequently the Legislature forbade its further use for such purpose, and further provided that upon petition of the city the court might order the removal of the bodies and monuments from the cemetery, and that upon payment to the owners of the sums decreed as the value of their interests the same should become a public park. In answer to the claim of the grantor's heirs, it was held: That if the plaintiffs' property had been taken by the state, it was taken by the act forbidding the use of the ground as a burial place, which destroyed the condition of the deed and rendered the grantees' title absolute; that the destruction

¹⁰ Part of the statement of facts is omitted.

¹¹ Part of the opinion is omitted.

of the plaintiffs' possibility of reverter in the exercise of the police power was not a taking for public use; and that they were not entitled to share in the damages for the subsequent taking of the land for public use because their right had already been extinguished. The case is not in point.

The terms, "qualified," "base," and "determinable" have been used "promiscuously" as descriptive of the estate claimed to have been created by this deed, though "determinable" is perhaps most accurate. Such a fee is an estate limited to a person and his heirs, with a qualification annexed to it by which it is provided that it must determine whenever that qualification is at an end. *Weed v. Woods*, 71 N. H. 581, 584, 585, 53 Atl. 1024; 2 Bl. Com. *109; 4 Kent, *9; 1 Cru. Dig. *73; Gray, Perp. § 32. A text-writer of authority takes the position that since the statute quia emptores there can be no possibility of reverter remaining in a grantor other than the sovereign upon a grant of a fee, and hence an attempt to create a determinable fee by private grant results in a fee simple absolute, unless the grant can be sustained as a gift or conveyance for charitable purposes with a possible resulting trust to the grantor and his heirs upon the accomplishment of the purpose, as has been suggested might be the proper construction of the deed in this case. Gray, Perp. §§ 31 (3), 41a.

The logic of the argument may be unanswerable (17 Harv. Law Rep. 297, 299), and it may be demonstrated that in England, at least, the possibility of such limited fee so created is a matter resting upon the authority of text-writers, instead of upon decisions of the courts. *Collier v. Walters*, L. R. 17 Eq. 252; *Collier v. McBean*, 34 Beav. 426; *Poole v. Needham*, Yelv. 149; and cases cited in Gray, Perp. § 33. But it is clear, and in fact is conceded, that the courts of this country have at least understood determinable fees to be possible estates, and the possibility of reverter dependent thereon a valid interest. *First Univ. Society v. Boland*, 155 Mass. 171, 174, 175, 29 N. E. 524, 15 L. R. A. 231; Gray, Perp. § 40 (2a). In this state, in addition to *Weed v. Woods*, supra, the existence of such interests are referred to by Judge Ladd in *Reed v. Hatch*, 55 N. H. 327, 338, and by Bell, C. J., in *Worster v. Company*, 41 N. H. 16, 22. In *Wood v. County*, 32 N. H. 421, it would appear from the statement of facts that a possibility of reverter upon a determinable fee had been upheld in an earlier decision in the case which was never reported. From memoranda in 18 Notes Supreme Court, 407, 456, it is clear there was no consideration of the question raised by Gray.

Since, if the contention of Prof. Gray is sound, it would dispose of the position upon which the plaintiff has rested his case the question is presented, and, in the absence of any discussion in the reports, might properly be now examined; but it has not been thought necessary to undertake the discussion, for, conceding the validity of the interest claimed for the plaintiff, such interest is not of a character to

entitle him to damages. The proprietor of a determinable fee, so long as the estate in fee remains, till the contingency upon which the estate is limited occurs, has all the rights and privileges over it that he would have if tenant in fee simple. After such a grant no right of seisin or possession remains in the grantor. All the estate is in the grantee notwithstanding the qualification. The only practical distinction between a right of entry for breach of a condition subsequent and a possibility of reverter upon a determinable fee is that in the former the estate in fee does not terminate until entry by the person having the right, while in the latter the estate reverts at once upon the occurrence of the event by which it is limited. *Walsingham's Case*, Plow. 557; *Jamaica Pond Corp. v. Chandler*, 9 Allen (Mass.) 159, 168, 169; *First Univ. Society v. Boland*, 155 Mass. 171, 174, 29 N. E. 524, 15 L. R. A. 231; *State v. Brown*, 27 N. J. Law, 13; 2 Bl. Com. *109, note; Cru. Dig. tit. 1, § 80; 4 Kent, *10; 1 Wash. R. P. (6th Ed.) §§ 164, 165; Gray, Perp. §§ 31 (3), 32.

Whether the plaintiff's right is a possibility of reverter upon a determinable fee, or a right of entry for breach of a condition subsequent, he had when the land was taken no right to the land and no possession of it. "Wherever the gift is of a fee, there cannot be a remainder, although the fee may be a qualified or determinable one. The fee is the whole estate. When once granted, there is nothing left in the donor but a possibility or right of reverter, which does not constitute an actual estate. * * * All the estate rests in the first grantee, notwithstanding the qualification annexed to it." *Brattle Sq. Church v. Grant*, 3 Gray (Mass.) 142, 150, 63 Am. Dec. 725. Whether the event upon which the plaintiff might come into ownership of the land would ever happen was mere speculation. There was no method by which the value of the interest could be assessed which would rise above the dignity of a guess. The plaintiff did not own the land taken. He was not an owner in fee, in reversion, or in remainder. He had no subsisting title in the land, but only a possibility that it might revert to him by the happening of the event upon which the estate of the society was determinable. "He is not, within the meaning of the act under which these proceedings are instituted, a person or corporation whose land is taken by the respondent. His possibility of interest is too remote and contingent to be the subject of an estimate of damages by a jury." *Chandler v. Corporation*, 125 Mass. 544, 547.

The case quoted from is the only decision found apparently exactly in point. Somewhat analogous, however, are the decisions in this state that a mortgagee not in possession is not entitled to notice or an assessment of damages (*Parish v. Gilmanton*, 11 N. H. 293; *Rigney v. Lovejoy*, 13 N. H. 247, 251; *Gurnsey v. Edwards*, 26 N. H. 224, 230; *Orr v. Hadley*, 36 N. H. 575, 579), which proceed upon the ground that until the mortgagee has entered under his mortgage the

mortgagor is the owner of the land. It is also held that damages are not assessable for an inchoate right of dower when land is taken by eminent domain, because such inchoate right is not an estate in the land. *Flynn v. Flynn*, 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98, 68 Am. St. Rep. 427; *Venable v. Railway*, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68. Another reason given is that such an interest is too uncertain to admit of compensation. *Mills*, Em. Dom. (2d Ed.) § 71.

Reliance has been placed upon the conclusions of the referee in *Re Brick Presbyterian Church*, 4 Bradf. Sur. (N. Y.) 503; and his division of the damages awarded for land taken for a street between the vault owners in the churchyard and the church has been suggested as proper to be followed as between the plaintiff and the society. But there is no similarity in law or fact between the two cases. As between the vault owners and the church, each owned a fee simple. The fee was determinable, if at all, only as between the church and their grantor. The vault owners owned a perpetual right, as against the church, below the surface of the ground where the burial vaults were situated. The church owned the fee above the surface of the ground. Each party owned a portion of the "aggregation of qualified privileges" which constitutes property in land. *Thompson v. Company*, 54 N. H. 545, 551. Each had a right to the possession, to the extent of his ownership. If the title of the vault owners was a base fee—a proposition at least open to doubt—so was that of the church. In *re Brick Presbyterian Church*, 3 Edw. Ch. (N. Y.) 155, 169. The division of the damages between the two owners of a similar fee was merely the estimation of the value of the qualified privileges belonging to each. The assessment was not an appraisal of the value of a determinable fee and a possibility of reverter, because there was no such division of interest between the parties interested. The case is inapplicable.

In this state, upon a taking for public use under the statutes upon which this proceeding is founded, all that is taken is the right to use for the public purpose. The owner retains the right to use the premises for any purpose not inconsistent with the public right. *Bigelow v. Whitcomb*, 72 N. H. 473, 57 Atl. 680, 65 L. R. A. 676; *Bailey v. Sweeney*, 64 N. H. 296, 9 Atl. 543; *Winchester v. Capron*, 63 N. H. 605, 4 Atl. 795, 56 Am. Rep. 554; *Blake v. Rich*, 34 N. H. 282; *Baker v. Shephard*, 24 N. H. 208, 218. If the Legislature has power to authorize the taking of the fee, as has been held elsewhere, the construction of the statute as to highways and railroads in the cases cited is conclusive such power has not been exercised. The damages are assessed upon the basis of a perpetual easement. *Peirce v. Somersworth*, 10 N. H. 369. In case of the public use for a park or library lot, the practical difference while the use lasts between taking an easement and a fee may be infinitesimal; but, since the fee is not taken, a discontinuance of the public use vests the whole estate in the original

owner. *Cheshire Turnpike v. Stevens*, 10 N. H. 133, 137; *Hampton v. Coffin*, 4 N. H. 517, 518, 519. That it was understood that the nature of the title acquired by the taking of land for a park was the same as in case of highways is shown by the statutory provisions for the discontinuance of a public cemetery, park, or common, and the assessment of damages to any person specially injured thereby in the same manner that special damages are assessed in case of the discontinuance of a highway. Pub. St. 1901, c. 51, §§ 3, 7; *Page v. Symonds*, 63 N. H. 17, 21, 56 Am. Rep. 481.

The state has taken the use of the land. As the society owned the use, the taking must have been from the society, and not from the plaintiff, who had no right to the use. Whether the plaintiff's possibility of reverter dependent upon a cessation of the public use, should the estate then come to him, is more or less valuable than his similar right upon the cessation of the religious use of the society, is plainly a possibility upon a possibility—a matter too indefinite and vague for pecuniary estimation. Whether upon a cessation of the public use the right to use would revert to the society, or the estate (assuming the validity of its determinable character) would at once vest in the plaintiff, is a question upon which discussion would be useless. If the fee of the society has not been taken, the title must revert to them, and the plaintiff's interest, whatever it is, remains absolutely unimpaired. If the title to the society is gone, then upon expiration of the public use the estate would at once revert to the plaintiff, and it is impossible to say whether he has been damnified or benefited by the taking from the society. Whatever interest the plaintiff may have, or whatever its correct technical definition, he has no interest which entitles him to appeal, and he cannot complain of the judgment allowing him \$1.

Exceptions overruled. All concur.

HALL v. TURNER.

(Supreme Court of North Carolina, 1892. 110 N. C. 292, 14 S. E. 791.)

Appeal from superior court, Orange county; Robert W. Winston, Judge.

Action by W. L. Hall, as administrator of Lambert W. Hall, deceased, and others, against Emma Turner, as administratrix of Evans Turner, deceased, and others. Judgment for defendants. Plaintiffs appeal. Reversed.

The other facts fully appear in the following statement by SHEPHERD, J.:

The plaintiffs, the administrator, widow, and heirs at law of Lambert W. Hall, allege that the said Lambert W. Hall and Evans Turner, on the 13th of March, 1873, entered into the following agreement, to-wit:

"Articles of agreement made and entered into this the 13th day of March, 1873, between L. W. Hall of the county of Orange, and state of North Carolina, of the one part, and Evans Turner, of the county and state aforesaid, of the other part, witnesseth, that the said L. W. Hall agrees and consents for the said Evans Turner to back water, if necessary, up into his field, on condition that said Evans Turner will allow the said L. W. Hall as much woodland along the line fence on the south side of the river. Said Turner is allowed to raise a dam 8 or 9 feet high. This agreement to remain good so long as the said Turner keeps up a mill at the Wagoner place; afterwards to be null and void. Witness our hands and seals the day and date above written. [Signed] L. W. Hall. [Seal.] Evans Turner. [Seal.] Witness: H. Y. Harris." The complaint further alleges that, at the time of the execution of said agreement, about 4 or 5 acres of woodland of said Turner were taken possession of by said Hall, and that he used the same until his death, in 1888; that said Turner, after the adoption of the stock law, in 1885, hauled off all the fences on said 4 or 5 acres, and that the same were mortgaged in 1882 to one Gray; that the dam raised by Turner is, from the bottom of the mud-sill to the top of the sheeting, 10 feet 3 inches, and from the mud-sill to bottom of the river about 2 feet, and the land of the plaintiff which is flooded and damaged by said mill-pond is about 12 acres, on most of which dower has been assigned to the plaintiff Fannie J. Hall; that the same would be very productive if not damaged by the said flooding; that plaintiffs have not continued in the possession of the 4 or 5 acres south of the river since the death of Evans Turner.

They demand judgment— (1) that "the license granted in said agreement" terminated at the death of said Turner, in 1889, and is void for uncertainty and indefiniteness, and is no longer operative and binding on the plaintiffs; (2) that, if it be considered as running with the land, the quantity of land damaged be ascertained, and the same quantity set apart to the plaintiffs south of the river, if said dam shall not exceed the height allowed in said agreement; (3) that, if said dam be found to be more than nine feet high, then they ask that the damages be inquired into, and for judgment for the same; (4) that, if plaintiffs are compelled to take the land south of the river in lieu of that flooded and damaged, the defendants be required to free the same from all mortgages and incumbrances existing thereon; (5) that the lands of plaintiffs be freed from said agreement, and the defendants keep the land on the south side of the river; (6) "that the dam be pulled down, and plaintiffs be paid all damages done them during the life of said Turner by reason of his violations of said agreement, and since that time by reason of said dam;" (7) that all damages up to the time of the trial be assessed; (8) for further and other relief, and for costs.

The defendants in their answer, admit the execution of said agreement, and that the land on the south of the river, mentioned in the complaint, was taken possession of by Hall, but they allege that the

quantity is underestimated, and that the same is equal to that covered by water in consequence of said dam. They deny the removal of the fences. They admit the execution of the mortgage. They deny the raising of the dam to the height alleged by plaintiffs. They deny any damage as alleged, and aver that, if there be any, it existed and was provided for at the time of the execution of the said agreement, by the taking possession of the four acres. They deny that the plaintiff has discontinued the use of said land since the death of Evans Turner. They deny any violation of said agreement by said Turner or themselves, and they claim that said agreement operates as a covenant running with the land.

The following issues were, without objection, submitted to the jury: "(1) Has the dam been raised above nine feet? Answer. No. (2) If so, what yearly damages have the plaintiffs sustained on account of same? (3) What quantity of land is covered by water ponded back by the dam, and damaged thereby? (4) What quantity of land is embraced in the tract agreed to be conveyed by Evans Turner to plaintiffs' intestate? A. Four acres, (by consent.)" * * *¹²

The following judgment was rendered: "This cause having been heard, and the jury for its verdict having said that the dam has not been raised above nine feet, and the court being of the opinion that the other issues submitted are not material, whether the agreement between the intestates of the plaintiffs and defendants respecting the erection of the dam is a license revocable at the death of Turner, or is void for uncertainty, and the court being further of opinion that if said agreement is a covenant perpetual running with and binding the land, then the equitable aid of the court cannot be invoked to ascertain and set apart to the plaintiffs the same quantity of land as is covered by water, for that there is neither allegation in the complaint nor proof that the defendants have ever declined or refused, or do now decline, to permit the plaintiffs to have, use, occupy, and enjoy the said quantity of land in as full and ample a manner as the said covenant or agreement authorizes, the court doth therefore adjudge that the plaintiffs take nothing by their writ, and that defendants go hence without day, and recover their costs." From this judgment the plaintiffs appealed.

SHEPHERD, J., (after stating the facts.) After a careful consideration of the charge of his honor in reference to the height of the dam, we are of the opinion that, in view of the testimony, there was no error, and that the exception of the plaintiffs in this particular must be overruled.

The other points presented in the record are not so clear, and we approach their consideration with no little doubt and solicitude. The plaintiffs insist that the right of the defendants to maintain the dam and overflow the plaintiffs' land determined at the death of the defendants' ancestor, Evans Turner; but, if they are mistaken in this,

¹² Part of the statement of facts is omitted.

they pray that the defendants, the heirs of said Turner, be required to "allow" the plaintiffs the use of so much land on the south of the river as will equal in acreage the quantity now overflowed and damaged by reason of the maintenance of the said dam. The agreement between the said Hall and Turner is of a very peculiar character, and so vague and uncertain in part that but for the fact of its having been executed by one of the parties, who has erected permanent improvements, we would be somewhat inclined to place it under that class of contracts mentioned by Lord Brougham in *Keppell v. Bailey*, 2 Mylne & K. 517, as being "so clearly inconvenient to the science of the law" as to receive no encouragement at the hand of the courts. Although the agreement contains no words of covenant, we think that in consideration of the circumstances an equitable construction warrants us in holding that it was the intention of Hall to confer upon Turner an easement "to back water, if necessary, up into his field." Such an easement is "an incorporeal hereditament; a right not, indeed, to the land itself, but to a privilege on and upon the land. * * * It is a freehold interest," and within the statute of frauds. *Bridges v. Purcell*, 1 Dev. & B. 492. It is true that in *McCracken v. McCracken*, 88 N. C. 272, it is said that such an interest must not only be evidenced by writing, but that it can "only be made effectual by deed;" but by the use of this language the learned justice who delivered the opinion was evidently referring to the subject in its legal aspects, as it is well settled that an agreement, upon a valuable consideration, to confer an easement, will be effectuated in equity, provided it be in writing; and this without reference to the presence of a seal. *Railroad v. Battle*, 66 N. C. 546; *Richmond & D. R. Co. v. Durham & N. Ry. Co.*, 104 N. C. 658, 10 S. E. 659. So, too, a covenant, though not technically "running with the land," may nevertheless be sometimes binding in equity, to the extent of fastening a servitude upon real property. *Pom. Eq. Jur.* 689; *Duke of Bedford v. Trustees*, 2 Mylne & K. 552.

Such is the character of the agreement before us; but the important question presented is, how long is this easement or servitude to continue? An interest like this, being within the statute of frauds, is created in the same manner as an interest in the land itself; and hence it would seem that, if there be a grant of an easement, there must be words of inheritance, if it is intended that the estate shall endure beyond the life of the grantee. So, on the other hand, if there be a contract to confer an easement, it will ordinarily be governed by the same principles as are usually applied to contracts for the sale of real estate. Thus, if one contract to sell land to another, and there be no words of restriction, it is implied that an estate in fee is intended, and specific performance will accordingly be decreed. Likewise, if one agree to confer an easement, and from the nature of the contract, and its subject-matter, there is nothing to show that it is to be restricted to the life of either party, there is an implication that the grant is to be co-extensive with the uses apparently contemplated by the parties.

In our case it is contended that there are words of restriction, to-wit: "This agreement to remain good so long as the said Turner keeps up a mill at the Wagoner place." In opposition to this view the defendants rely upon the case of *Merriman v. Russell*, 2 Jones, Eq. 470. In that case the "articles of agreement" contained no words of inheritance, but simply the following language, viz.: "Bargained and sold so much of my land lying on Hooper's creek, in the county and state aforesaid, as will conveniently carry the water to a saw-mill, so as to be to his [W. R. Gash's] profit and advantage." The court speaks of this writing as a grant; and Pearson, C. J., in delivering the opinion, said: "There are no words of limitation, and by the rule of the common law, in reference to a grant of land, only an estate for the life of the grantee would pass. Here the rule of construction comes in again. As the professed purpose is to convey water to a mill, of course it was the intention that the supply of water should be kept up as long as the party wished to operate the mill. Few would be at the expense of erecting a mill if the supply of water depended upon the uncertainty of life. We think there was a base or qualified fee granted in this easement, and that Gash, his heirs and assigns, are entitled to it so long as they continue to operate the mill." However just may be the criticism upon the resort to construction in the above case, and thereby supplying words of inheritance, if indeed the instrument was considered simply in its legal character, as a grant, it is very clear that the objection cannot be urged in the present instance, where the agreement is entirely executory in its nature. At all events the Case of *Merriman*, supra, lends us valuable aid in solving the question now before us. In that case the easement was in so much of the land "as will conveniently carry the water to a saw-mill so as to be to his [W. R. Gash's] profit and advantage."

Why should not these words be considered as equally restrictive as those used in the present contract, viz., "this agreement to remain good so long as the said Turner keeps up a mill at the Wagoner place?" In one case the easement is to be to "his [the grantee's] advantage;" in the other, so long as "Turner keeps up a mill," etc. It would seem that the privilege granted was as personal in one case as in the other; but, admitting that there is a shade of difference between them, yet this must surely disappear when the contract is viewed in the light of the reasoning of the opinion in the case above mentioned. "Few [says the court] would be at the expense of erecting a mill if the supply depended upon the uncertainty of life;" and so, too, we may remark in this case that few would erect a mill-dam and other improvements if its enjoyment was to be contingent upon the duration of the life of one of the parties. In consideration of the foregoing reasons, and in the absence of plain restrictive language, we conclude that it was not the intention of the parties that Turner was to have a mere personal right to flood the land of Hall, but that the easement or servitude descended

with the land to the heirs of Turner, who have, in equity, a base, qualified, or determinable fee therein.

But here we are confronted with the case of *School Committee v. Kesler*, 67 N. C. 443, in which Pearson, C. J., speaks of a base or qualified fee as an "obsolete estate, which has never been in force or in use in this state." It is impossible to reconcile the conflicting utterances of that distinguished jurist upon this subject. Whenever a fee is so qualified as to be made to determine or liable to be defeated upon the happening of some contingent event or act the fee is said to be base, qualified, or determinable. Tied. Real Prop. 44. This definition, in a general sense, comprehends a fee upon condition, a fee upon limitation, and a fee conditional at common law. Some authors apply the term "base fee" solely to limitations of the last-named class, (Tied. Real Prop. *supra*;) and these having been converted into estates tail by the statute *de donis*, and these latter, by our statute, into fee-simple, it would of course follow that if the term "base fee" is exclusively applicable to a fee conditional, as it was technically known at common law, it no longer exists in this state. Blackstone's classification is different, (2 Bl. Comm. 110,) and there is some confusion in the ancient authorities upon the subject. Practically, however, in modern times, the terms "base," "qualified," or "determinable" fees are applied to either of the estates above mentioned. Mr. Washburn (1 Washb. Real Prop. 77,) thinks that the term "determinable fee" is "more generic in its meaning, embracing all fees which are liable to be determined by some act or event expressed on their limitation to circumscribe their continuance, or inferred by law as bounding their extent." See, also, 1 Prest. Est. 466; *Seymour's Case*, 10 Coke, 97.

The term "qualified fee" is thought to be preferable by Mr. Minor. 2 Inst. 86. By whatever name it may be called, it is plain that except in the case of technical fees, conditional at common law, the limitations we have mentioned may still be made, when not opposed to public policy. It will be observed that in *Kesler's Case* the decision was made to turn chiefly on the ground of public policy, and because apt words of limitation were not employed. In that very decision the existence of a base or qualified fee is recognized in the *Case of the Cherokee Tribe of Indians*. 87 N. C. 229. But, however broad may be the language quoted, we have no idea that it was the purpose of the chief justice to say that the limitation expressly defined by him as a base or qualified fee in *Merriman's Case* could not be made in North Carolina. Such limitations are not infrequent in this and other states, (2 Washb. Real Prop. 4;) and we are not prepared to adopt a view which leads to such a revolution in the law of limitations of real property. We are therefore of the opinion that Turner and his heirs took, in equity, an easement to overflow the land of Hall, determinable when they ceased to keep up the said mill.

In this respect it is a limitation. But it is to be observed that this base, qualified, or determinable fee (we prefer the term "qualified") is

liable to be defeated by the failure of Turner "to allow the said L. W. Hall as much woodland along the line fence on the south side of the river." In this particular the estate in the easement is an estate upon condition, and the condition is, in effect, that Hall is to be allowed to use as much land on the south side as is equal to the land which is flooded by the maintenance of the dam at the height of nine feet. This includes, not only the land actually flooded, but all that is damaged and rendered unfit for cultivation by sobbing. *Cagle v. Parker*, 97 N. C. 271, 2 S. E. 76. It seems that, soon after the execution of the agreement, Hall was put in possession of about four acres, and continued to occupy it until the death of Turner.

It is insisted that the plaintiffs are restricted to this particular number of acres. This may be so in some cases; as, for instance, where a right of way is granted, if it be once located it cannot be changed. It may also be true of contracts generally of this character, but we do not think that this particular contract is susceptible of such a construction. No provision is made for the ascertainment of the land, nor is there anything to show that the parties intended to fix upon any certain quantity as a final consideration of the easement. Had they so intended, they would doubtless have provided for it in the agreement. The words are strict words of condition, and, as applied to this case, they constitute a condition subsequent. It was evidently the purpose of the parties that Hall should use as much of Turner's land as would equal the quantity flooded by the dam, and that this agreement was to be carried out in good faith, and in view of the exigencies of the future. If the four acres taken possession of by Hall were to be in full satisfaction for the easement, the contract should have so stipulated. The agreement means that so long as Turner, his heirs or assigns, keep up the mill, they are entitled to the easement, provided they permit Hall and his heirs or assigns to enjoy an equal quantity of land on the south side of the river. If they refuse to perform this condition, the plaintiffs are entitled to a decree declaring that the easement is at an end.

As we have indicated, we think that Hall was not restricted to the four acres, and in this view the third issue, involving an inquiry as to the quantity of land flooded, should have been submitted to the jury. If it should be found that more than the four acres is flooded and sobbed, and thus rendered unfit for cultivation, by the maintenance of the dam at the height of nine feet, the defendants must "allow" the plaintiffs the use of an equal quantity of land. It was this uncertain and variable feature of the agreement that seemed at the outset so novel to us, and it is because of this that the plaintiffs pray that the agreement be declared void. As, however, the contract has been executed by the defendants by the erection of permanent improvements, and as it does not contemplate a conveyance of any land, but simply a right to occupy it, we think that it would be inequitable to make such a decree until it is apparent that the defendants are either unwilling, or by their conduct have put it out of their power, to perform the condition.

The fact that the land of Turner has been mortgaged does not, of itself, work a forfeiture; for this does not happen until there has been an actual disturbance of the possession of the plaintiffs. As to the four acres, the mortgagee is affected with constructive notice of the claim of the plaintiffs, and takes subject to their right to use the same. If the plaintiffs should be allowed the use of an additional quantity of land, and the mortgagee has had no actual notice, then he would take such additional land free from any claim of the plaintiffs; and, if by reason of such mortgage the plaintiffs are ousted, there would then be clearly a breach of the condition, and the easement of the defendants, at the election of the plaintiffs, would be forfeited.

If, upon another trial, it be found that more than four acres are flooded and sobbed, then the defendants should submit to the appointment of commissioners to lay off and set apart sufficient land of the defendants for the use of the plaintiffs as will meet the requirements of the contract as interpreted by us. It is said that there is no allegation that the defendants have declined to allow the plaintiffs the relief we have indicated. This is a mistake, as the plaintiffs expressly allege that more than four acres have been flooded, and they pray that if the agreement is not declared void "the quantity of land damaged be ascertained, and the same quantity set apart to the plaintiffs south of the river, if said dam shall not exceed the height allowed in the agreement." The answer, in effect, denies that the plaintiffs are entitled to any larger quantity than the said four acres.

In view of the peculiarity of the case, we are not surprised at the ruling of his honor; but, after much consideration, we are of the opinion that for the reasons given there should be a new trial.

EQUITABLE ESTATES—USES AND TRUSTS

I. The Statute of Uses ¹

KIRKLAND v. COX.

(Supreme Court of Illinois, 1880. 94 Ill. 400.)

Appeal from circuit court, Montgomery county; Charles S. Zane, Judge.

Ejectment by George T. Cox and others, the heirs at law of Michael Walsh, deceased, against Thomas C. Kirkland, trustee of the estate of said deceased. There was judgment for plaintiffs, and defendant appeals. Reversed.

Michael Walsh died on the 23d day of September, 1867, leaving a will containing the following provisions:

"As to my worldly estate, all the real, singular, personal and mixed, of which I shall die seised and possessed, or to which I may be entitled after my decease, after the payment of all just debts, demands and funeral charges, I hereby grant, devise, convey and confirm unto Horatio M. Vandever of Taylorville, Christian county, Illinois, and Charles T. Hodges, of Walshville, Montgomery county, Illinois, and Andrew Sproule, of Saint Louis, Missouri, reposing in each of said persons full trust and confidence: in trust, however, for the following purposes:

"First. I desire and direct my said trustees to assume and take entire control of my said estate during the term or terms and under the conditions hereinafter expressed, to collect all outstanding dues, rents, profits and interests of whatever character, derived therefrom, and to govern and control all such interests as may accrue and arise to said estate, from time to time, and to make such disposal of said estate as shall in their judgment benefit and increase the value of said estate; and especially do I design and direct Charles T. Hodges, one of my said trustees, to sell all the real estate belonging to me and situated in the town of Pana, Christian county, Illinois, in the town of Stanton, Macoupin county, Illinois, and in the towns of Litchfield, Hillsboro and Walshville, Montgomery county, Illinois. * * *

"Second. I desire and direct that said trustees shall pay, or cause to be paid, out of said estate, to my beloved daughter and only child, Mary Lucy Walsh, such installments of money as in the judgment of my said trustees shall be deemed proper and sufficient to meet her current expenses, and provide her an ample and comfortable support.

"Third. When my said daughter, Mary Lucy Walsh, shall arrive at

¹ For discussion of principles, see Burdick, Real Prop. §§ 120, 121.

the full age of thirty-five years, and is then unmarried, I desire and direct that my said estate shall be transferred to her by my said trustees, and ever thereafter said estate shall vest in her and be under her absolute control.

"Fourth. It is, however, provided that if my said daughter should, on or before her thirty-fifth birthday, become married to a person who shall be deemed and considered by my said trustees as a person worthy and competent, and in whom confidence can be reposed, then said trustees shall, as soon as they become satisfied that such person is so worthy, place the whole of said estate under the control of my said daughter, and ever thereafter said estate shall be vested in her name, and under her absolute control forever.

"Fifth. In case said daughter shall be, at her thirty-fifth birthday, married to a person whom said trustees shall consider and deem incompetent and unworthy, and not a suitable person who should have any care or control of said estate as husband, then said estate shall continue and remain vested in said trustees in trust; and I desire and direct said trustees to continue to make payments to said daughter, in such amounts and at such times as in their judgment they may think proper, and the circumstances and station of said daughter may demand; and in case of the death of such husband, said estate shall vest absolutely in and be under the control of said daughter, provided she shall be of the age of thirty-five years. * * *

"Seventh. In case my said daughter shall die without issue, it is my wish and will, and I hope it may meet with her approbation, that the whole of my said estate shall be disposed of as follows, viz." Then follow certain specified legacies to individuals, amounting, in the aggregate, to \$2,600, after which is the following: "The balance of my said estate, upon the happening of such contingency, viz., the death of my daughter without issue, I wish divided equally between the 'House of the Good Shepherd,' situated in the city of St. Louis, State of Missouri, 'Saint Joseph Male Orphan Asylum,' Washington City, District of Columbia, and 'Saint Ann's Infant Asylum,' of Washington City, District of Columbia."

The Mary L. Walsh mentioned in the will was the only child and heir at law of Michael Walsh, and she died July 18, 1875, leaving plaintiffs as her heirs at law and next of kin. Defendant is administrator de bonis non of the Charles T. Hodges mentioned in the will, and who alone qualified as trustee. The contingent beneficiaries, for whom defendant claimed to hold possession, are duly organized corporations carrying on the objects for which they were incorporated.

SCHOLFIELD, J. In this form of action, since the naked legal title must control, we think it sufficient to show that title is not in appellees, and the judgment below cannot, therefore, be sustained.

The rule is, undoubtedly, as claimed by appellees' counsel, that trustees must be presumed to take an estate only commensurate with the

charges or duties imposed on them; but this, however, is subject to the qualification that such presumption shall be consistent with the intention of the party creating the trust, as manifested by the words employed in the instrument by which it is created. *Shelley v. Edlin*, 4 Adol. & El. 582-589, 31 E. C. L. 143; *Cadogan v. Ewart*, 7 Adol. & El. 636, 666; *Davies v. Davies*, 1 Adol. & El. (N. S.) 430, 41 E. C. L. 611.

Under the statute of uses, which is in force here, where an estate is conveyed to one person for the use of or upon a trust for another, and nothing more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used. *Perry, Trusts*, § 298. And so we have expressly held. *Witham v. Brooner*, 63 Ill. 344; *Lynch v. Swayne*, 83 Ill. 336.

But this, it will be observed, has reference only to passive trusts, or what are sometimes termed simple or dry trusts; and in such cases the legal estate never vests in the feoffee for a moment, but is instantaneously transferred to the cestui que use as soon as the use is declared. 2 Bl. Comm. (Sharswood's Ed.) 331, 332; and *Witham v. Brooner*, *supra*.

It is said in *Perry on Trusts* (section 300): "Although it is probable that it was the intent of the statute (i. e., of uses) to convert all uses or trusts into legal estates, yet the convenience to the subject of being able to keep the legal title to an estate in one person, while the beneficial interest should be in another, was too great to be given up altogether, and courts of equity were astute in finding reasons to withdraw a conveyance from the operation of the statute. Three principal reasons or rules of construction were laid down whereby conveyances were excepted from such operation: First, where a use was limited upon a use; second, where a copyhold or leasehold estate, or personal property was limited to uses; third, where such powers or duties were imposed with the estate upon a donee to uses that it was necessary that he should continue to hold the legal title in order to perform his duty or execute the power. In all of these three instances courts, both of law and equity, held that the statute did not execute the use, but that such use remained as it was before the statute, a mere equitable interest to be administered in a court of equity." And again, in section 305, it is said: "The third rule of construction is less technical, and relates to special or active trusts, which were never within the purview of the statute. Therefore, if any agency, duty or power be imposed on the trustee, as, by a limitation to a trustee and his heirs to pay the rents, or to convey the estate, or if any control is to be exercised or duty performed by the trustee in applying the rents to a person's maintenance, or in making repairs, or to preserve contingent remainders, or to raise a sum of money, or to dispose of the estate by sale, in all these and in other and like cases, the operation of the stat-

ute is excluded, and the trusts or uses remain mere equitable estates. So, if the trustee is to exercise any discretion in the management of the estate, in the investment of the proceeds or the principal, or in the application of the income, or if the purpose of the trust is to protect the estate for a given time, or until the death of some one, or until division. * * *

And again, in regard to enlarging and extending estates given to trustees, the same author, in section 315, says: "So, if land is devised to trustees without the word heirs, and a trust is declared which can not be fully executed but by the trustees taking an inheritance, the court will enlarge or extend their estate into a fee simple to enable them to carry out the intention of the donors. Thus, if land is conveyed to trustees without the word heirs, in trust to sell, they must have the fee, otherwise they could not sell. The construction would be the same if the trust was to sell the whole or a part, for no purchasers would be safe unless they could have the fee, and a trust to convey or to lease at discretion would be subject to the same rule. A fortiori, if an estate is limited to trustees and their heirs, in trust to sell or mortgage or to lease at discretion, or if they are to convey the property in fee, or to divide it equally among certain persons, for to do any or all of these acts requires a legal fee." See, also, to the same effect, *Hill, Trustees* (4th Am. Ed.) 376; *Rees v. Williams*, 2 Mees. & W. 749.

In those cases where the legal fee is not vested in the trustee, it will, of course, in the absence of a devise prevailing to the contrary, vest in the heir at law. And there are also cases in which, it having been the duty of the trustee to convey to the heir at law, it will be presumed, after the lapse of considerable time, that such conveyance has been made. *Hill, Trustees* (4th Am. Ed.) 401; *Perry, Trusts*, § 350; *Gibson v. Rees*, 50 Ill. 383; *Pollock v. Maison*, 41 Ill. 516. But it is not claimed, nor could it be, that there is any foundation for such presumption in the facts found in this record.

In *Harris v. Cornell*, 80 Ill. 67, it was said, referring to *Hardin v. Osborne*, Sept. Term, 1875, that it had been held the purposes of a trust having been accomplished, the owner of the trust became, by operation of law, reinvested with the legal title and could sue in ejectment. This was unadvisedly said. A rehearing was granted in *Hardin v. Osborne*, and the opinion therein referred to was withdrawn. In *McNab v. Young*, 81 Ill. 11, language of like import as that used in *Harris v. Cornell*, supra, was used upon the authority of the same case, although it is therein erroneously referred to as being reported in 60 Ill., at page 93. The case there reported, of that name, does not discuss that or any kindred question.

The true doctrine in regard to active trusts, and that adhered to by this court, is expressed in *Vallette v. Bennett*, 69 Ill., at page 636, that where the legal title is vested in the trustee, nothing short of a reconveyance can place the legal title back in the grantor or his heirs,

subject, of course, to the qualification that, under certain circumstances, such reconveyance will be presumed without direct proof of the fact.

The language of Walsh's will is: "As to my worldly estate, all the real, personal and mixed, of which I shall die seized and possessed, * * * I hereby grant, devise, convey and confirm unto" (naming the trustees), "in trust," etc. He then directs his said trustees to assume and take entire control of his estate; to collect all outstanding dues, rents, profits and interests of whatever character, derived therefrom, and to govern and control all such interests as may accrue and arise to said estate from time to time; to make such disposal of said estate as shall in their judgment benefit and increase the value of said estate; that said trustees "shall pay, or cause to be paid, out of said estate," to his daughter, Mary Lucy, "such installments of money as in the judgment of said trustees shall be deemed proper and sufficient to meet her current expenses, and provide her an ample and comfortable support;" that said trustees should transfer his estate to his said daughter upon her reaching the age of 35 years, she being then unmarried, but if then married, they are directed to transfer the estate to her only upon the contingency that they should deem her husband a person in whom confidence might be placed; but if the trustees should deem the husband an incompetent and unfit person to have the care and control of the estate, they are directed to continue to make payments to his daughter, "in such amounts and at such times as in their judgment they may think proper," and that the circumstances and station of his daughter may demand; that in the event of the death of his daughter without issue, certain specific legacies, amounting to some \$2,600 in the aggregate, are given, and the balance of his estate is to be divided equally between the House of the Good Shepherd, Saint Joseph's Male Orphan Asylum, and Saint Ann's Infant Asylum; and he then exempts his trustees from liability for all losses occurring without their fault.

This very clearly gave the entire control and management of the estate to the trustees until Mary Lucy should arrive at the age of 35 years—being unmarried; and she having died before she reached that age, the control and management of the estate continued to devolve upon them. The language employed so plainly conveys this idea that it can admit of no controversy.

The power "to make such disposal of the estate as shall," in the judgment of the trustees, "benefit and increase the value of said estate,"—as also the duty of paying Mary Lucy "such installments of money as in the judgment of said trustees shall be proper and sufficient to meet her current expenses and provide an ample and comfortable support,"—necessarily imply the power to sell the lands and convert them into money or interest bearing securities; for this might well, in the judgment of the trustees, benefit and increase the estate,

and be essential to make payment of the sums directed to be paid to Mary Lucy. The power implied to sell, is to sell the whole title.— and to this is essential the power to convey that title, requiring, as a condition precedent, a fee-simple estate in the trustees.

The property is devised to the trustees to sell and convey, if they deem it advisable, or to hold and control until it is to be transferred as directed; and in the contingency that has arisen, it was intended that it should be the duty of the trustees to make the equal division of the property between the corporations designated and convey it accordingly; for the grant to these corporations is in severalty, and not as tenants in common, and their title must necessarily rest on the conveyance of the trustees.

Whether the corporations can hold or not is not now material. The words of the devise show the intention of the testator that the trustees should take a fee, whether he was mistaken in the law as respects the objects of his intended bounty or not. The only difference would be, if the corporations cannot take, the trustees, instead of holding the legal title in trust for them, hold it in trust for the heirs at law. *Hill, Trustees* (4th Am. Ed.) 208, 209.

The legal title, then, being in the trustees, the heirs at law could not maintain ejectment. *Perry, Trusts*, §§ 17, 328, 520; *Hill, Trustees* (4th Am. Ed.) 422, 423, *274; *Id.* 482, *317; *Id.* 672, *428; *Id.* 784, *503; *Bull. & T. Trusts & Trustees*, p. 811.

The judgment of the circuit court is reversed. Judgment reversed.²

II. Creation of Express Trusts³

1. IN GENERAL

In re SMITH'S ESTATE.⁴

(Supreme Court of Pennsylvania, 1891. 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641.)

Appeal from orphans' court, Philadelphia county; Hanna, Judge.

Accounting of the Pennsylvania Company for Insurance on Lives and Granting Annuities, as executor of the estate of Thomas Smith, deceased. Henry S. Parmalee, as guardian of Thomas Smith Kelly, claimed and was awarded certain bonds left by testator, on the ground

² That trusts are uses which survived the statute of uses, see *Fuller v. Mission*, ante, p. 31.

³ For discussion of principles, see *Burdick, Real Prop.* § 132.

⁴ Although this case deals with the creation of a trust of personal property, it is here presented, in part, for its clear statements of certain principles applicable to trusts in general.

that testator held them in trust for said ward. The executor appeals. Affirmed.

CLARK, J.⁵ The appellant is the Pennsylvania Company for Insurance on Lives and Granting Annuities, trustee under the will of Thomas Smith, deceased; the appellee, Henry S. Parmalee, guardian of Thomas Smith Kelly, a minor. The proceeding was the adjudication of an account, filed by the trustee under the will of Thomas Smith, of the principal and income of \$13,000 of Pensacola & Atlantic Railroad Company's coupon bonds, which the said trustees claimed were part of the estate of decedent, and passed to them under his will. The guardian of Thomas Smith Kelly, a minor, appeared before the auditing judge, and claimed that the bonds had been held by the testator in trust for said minor, and should be awarded to the latter's guardian. The auditing judge and the judges of the orphans' court sustained the guardian's claim, and awarded him the fund.

The owner of personal property, in order to make a voluntary disposition of it, may, by a proper transfer of the title, make a gift of it direct to the donee, or he may impress upon it a trust for the benefit of the donee. It is well settled, however, that whether a gift or a trust is intended, if the transaction still remains imperfect and executory, equity will not aid in its enforcement. The expression of a mere intention to create a trust, therefore, without more, is insufficient. Like a promise to give, it will not be enforced in equity. *Dipple v. Corles*, 11 Hare, 183; *Helfenstein's Estate*, 77 Pa. 328, 18 Am. Rep. 449. Almost all trusts are in a certain sense executory. Ordinarily, a trust cannot be executed except by conveyance. There is, in most cases, something to be done. But this is not the sense in which a trust is said to be executory. An executory trust, properly so called, is one in which the limitations are imperfectly declared, and the donor's intention is expressed in such general terms that something not fully declared is required to be done in order to complete and perfect the trust, and to give it effect. When the limitations of a trust are fully and perfectly declared, the trust is regarded as an executed trust. *Egerton v. Brownlow*, 4 H. L. Cas. 210; *Cushing v. Blake*, 30 N. J. Eq. 689; *Pom. Eq. Jur.* § 1001. Nor in such case, if it appear that the intention of the donor was to adopt either one of these methods of disposition, will a court resort to the other for the purpose of carrying it into effect. What is clearly intended as a voluntary assignment or a gift, but is imperfect as such, cannot be treated as a declaration of trust. If this were not so, an expression of present gift would in all cases amount to a declaration of trust, and any imperfect gift might be made effectual simply by converting it into a trust. There is no principle of equity which will perfect an imperfect gift, and a court of equity will not impute a trust where a trust was not in contempla-

⁵ Part of the opinion is omitted.

tion. *Milroy v. Lord*, 4 De Gex, F. & J. 264–274; *Flanders v. Blandy*, 45 Ohio St. 108, 12 N. E. 321.

Upon the same ground it has been held that a paper of a testamentary character, but invalid for want of proper execution, cannot be enlarged or converted into a declaration of trust. *Warriner v. Rogers*, L. R. 16 Eq. 340. In *Richards v. Delbridge*, L. R. 18 Eq. 11–13, it was held, overruling *Morgan v. Malleson*, L. R. 10 Eq. 475, and *Richardson v. Richardson*, L. R. 3 Eq. 686, that to create a trust there must be the expression of an intention not to create a present gift, but to become a trustee. See, also, *Milroy v. Lord*, *supra*; *Brett*, Lead. Cas. 58; *Long's Appeal*, 86 Pa. 196. Although the cases may not be altogether consistent, the rule is now, we think, well settled in accordance with the doctrine declared in *Richards v. Delbridge*, *supra*, that, if the transaction is intended to be effected by gift, the court will not give it effect by construing it as a trust. It is well settled that nothing can take effect as an assignment or gift which does not manifest an intention to relinquish the right of dominion on one hand and to create it on the other. If the donor has perfected his gift as he intended, and has placed the subject beyond his power or dominion, the want of consideration is immaterial; the donee's right will be enforced. A gift can only be effectual after the intention to make it has been accompanied by delivery of possession or some equivalent act. If it is not, the transaction is not a gift, but a contract merely. If a trust is intended, it will be equally effectual whether the donor transfer the title to the trustee or declare that he himself holds the property for the purposes of the trust. "It is well settled that the owner of personal property may impress upon it a valid present trust, either by a declaration that he holds the property in trust, or by a transfer of the legal title to a third party upon certain specified trusts; in other words, he may constitute either himself or another person trustee. If he makes himself trustee, no transfer of the subject-matter of the trust is necessary; but if he selects a third party, the subject of the trust must be transferred to him in such mode as will be effectual to pass the legal title." *Bisp. Eq.* 78; *Perry, Trusts*, §§ 96–98; *Hill, Trustees*, 117 et seq.; *Dickerson's Appeal*, 115 Pa. 210, 8 Atl. 64, 2 Am. St. Rep. 547.

In *Richards v. Delbridge*, L. R. 18 Eq. 11–13, Sir George Jessel said: "A man may transfer his property without valuable consideration in one of two ways: He may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the title, may so deal with the property as to deprive himself of

its beneficial ownership, and declare that he will hold it from that time forward in trust for the other person." *Heartley v. Nicholson*, L. R. 19 Eq. 233, is to the same effect. If the donor makes a third party a trustee, he must transfer to him the subject of the trust in such mode as will be effectual to pass the title. The transaction, as in the case of a gift, to be effectual, must be accompanied by delivery of the subject of the trust, or by some act so strongly indicative of the donor's intention as to be tantamount to such a delivery; but where the donor makes himself the trustee, no transfer of the subject-matter is necessary. *Ex parte Pye*, 18 Ves. 140, *Donaldson v. Donaldson*, Kay, 711, and *Crawford's Appeal*, 61 Pa. 52, 100 Am. Dec. 609, are illustrations of trusts in this form. In such cases no assignment of the legal title is required, for the nature and effect of the transaction is that the legal title remains in the donor for the benefit of the donee. It is conceded that, as the bonds of the Pensacola & Atlantic Railroad Company—the bonds in question—were not delivered to Thomas Smith Kelly by Thomas Smith, the transaction cannot be sustained as a gift. It is clear that a gift was not in contemplation, and the only question for our determination is whether or not a complete and valid trust was created, for a trust would seem to have been contemplated.

There is no certain form required in the creation of a trust. In the case of personal property or choses in action, trusts may be proved by parol. If the declaration be in writing, it is not essential, as a general rule, that it should be in any particular form. It may be couched in any language which is sufficiently expressive of the intention to create a trust. "Three things, it has been said, must concur to raise a trust,—sufficient words to create, a definite subject, and a certain or ascertained object; and to these requisites may be added another, viz., that the terms of the trust should be sufficiently declared." *Bisp. Eq.* 65, citing *Cruwys v. Colman*, 9 Ves. 323; *Knight v. Boughton*, 11 Clark & F. 513. The intention must be a complete one, and this requisite is especially applicable to trusts created by voluntary dispositions. "A mere inchoate and executory design is not enough, and, unless there is some distinct equity,—as fraud, for example,—it cannot be enforced." *Bisp. Eq.* 65. The intention must be plainly manifest, and not derived from loose and equivocal expressions of parties, made at different times, and upon different occasions; but any words which indicate with sufficient certainty a purpose to create a trust will be effective in so doing. It is not necessary that the terms "trust" and "trustee" should be used. The donor need not say in so many words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning, for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning. *Richards v. Delbridge*, *supra*.

In *Heartley v. Nicholson*, *supra*, Vice-Chancellor Bacon says: "It is not necessary that the declaration of a trust should be in terms explicit, but what I take the law to require is that the donor should have evinced by his acts, which admit of no other interpretation, that he himself had ceased to be, and that some other person had become, the beneficial owner of the subject of the gift or transfer, and that such legal right of it, if any, as he retained, was held in trust for the donee." "The one thing necessary," says the same learned judge in *Warriner v. Rogers*, *supra*, "to give validity to a declaration of trust,—the indispensable thing,—I take to be that the donor or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration; should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest." The acts or words relied upon must be unequivocal, plainly implying that the person holds the property as trustee. *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446. Therefore, in *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634, where the donor signed a paper certifying simply that certain bonds belonged to his sons, but did not declare in any words of plain import that he held them in trust for them, the declaration was held to be insufficient. In *Helfenstein's Estate*, 77 Pa. 328, 18 Am. Rep. 449, Mr. Justice Sharswood says: "There is no prescribed form for the declaration of a trust. Whatever evinces the intention of the party that the property, of which he is the legal owner, shall beneficially be another's, is sufficient." * * *

2. EXTENT OF TRUSTEE'S ESTATE

See *Kirkland v. Cox*, *ante*, p. 239.

3. PARTIES

STEARNS v. FRALEIGH.

(Supreme Court of Florida, 1897. 39 Fla. 603, 23 South. 18, 39 L. R. A. 705.)

Appeal from circuit court, Gadsden county; William D. Barnes, Judge.

Bill by Louis A. Fraleigh and others against R. C. Stearns and another for the cancellation of a certain deed, and the appointment of a trustee. From a decree appointing a trustee, and declaring that the deed only conveyed the interest of one Mary A. Fraleigh, defendant, Stearns appeals. Modified.

On June 4, 1890, appellees filed their bill in equity in the circuit court of Gadsden county, making appellant and one Mary A. Fraleigh defendants thereto. An amended bill was filed by appellees April 16, 1891, whereby it was alleged that on January 18, 1864, Emanuel M. Fraleigh, husband of defendant Mary A. Fraleigh, executed a trust deed of conveyance to one Samuel B. Love, a certified copy of which was made a part of the bill. The deed referred to purported to be made for and in consideration of the great love and affection which the grantor bore towards his wife, Mary A. Fraleigh, and his children, Lillie C., Cornelia M., and Clara W. Fraleigh, as well as in consideration of the sum of \$10 to the grantor paid; and it conveyed to Samuel B. Love, his heirs and assigns, certain real and personal property in Gadsden county, therein described. The deed contained the following provisions: "To have and to hold the aforegranted property to the said S. B. Love, his heirs and assigns, in trust, nevertheless, for the sole use of the said Mary A. Fraleigh, wife of the said E. M. Fraleigh, for and during her natural life, and after her death to such children as she may have living at the time of her death, share and share alike, with power to the said Samuel B. Love to sell any portion of said trust estate, and to reinvest the proceeds in such other property, subject to the above-described trust, as he shall deem most for the interest of said trust estate, with power to the said Mary A. Fraleigh to appoint and choose, by her writing under her seal, another trustee instead of the said Samuel B. Love, whenever the said Samuel B. Love shall wish to resign said trust, or shall die leaving the same unfulfilled; said trustee so appointed taking said trusteeship subject to the trust herein limited."

It was further shown by the amended bill that on May 23, 1866, Samuel B. Love executed under seal, and in the presence of two subscribing witnesses, an instrument in writing whereby, after reciting that said Love was holding in trust certain lands, etc., for Mary A. Fraleigh and her children, more fully set forth and described in the trust deed above described, he did thereby resign and relinquish said trusteeship, as by the provisions of said trust deed he claimed the right and authority to do; and on the same day Mary A. Fraleigh executed under seal, and in the presence of two subscribing witnesses, an instrument in writing, whereby, after reciting the trust deed before referred to, and its provision empowering her to appoint or choose another trustee whenever the said Love wished to resign, and that said Love had resigned the trusteeship, leaving same unfulfilled, she did, by virtue of the authority vested in her by said trust deed, constitute and appoint E. M. Fraleigh trustee in lieu of said Love. Each of these instruments was proven by a subscribing witness, and recorded in the clerk's office of Gadsden county on August 23, 1866.

It was further alleged by said amended bill that appellant was in possession of certain lands described in the trust deed, claiming title

to same by virtue of a deed from one Samuel Hamblin, who received deeds to said lands from Mary A. and E. M. Fraleigh (the latter pretending to execute said deeds as trustee), dated January 20, 1874; that the property embraced in said deed had "run down," and was "going to waste," and that appellees had received no benefits, rents, or profits therefrom since the date of said deed to Hamblin; that appellant and Samuel Hamblin combined and confederated with E. M. Fraleigh and other persons to destroy the force and effect of the trust deed, and to deprive appellees of all benefits that might arise from the proper control and management of the property, in order that appellant might obtain title thereto and possession thereof, and that the title passed to the said Samuel Hamblin for little or no consideration; that the proceeds of the sale were not reinvested as required by the trust deed, and that appellant knew that fact; that the appointment of Emanuel M. Fraleigh as trustee was unauthorized, null, and void, the said Mary A. Fraleigh being under coverture, the wife of said E. M. Fraleigh, at the time of making such appointment; that the deeds made by virtue of said appointment, by E. M. Fraleigh, pretended trustee, and the said Mary A. Fraleigh, to Samuel Hamblin, and the one from Hamblin to appellant, passed no title, and were null and void.

It was further alleged that Samuel B. Love and E. M. Fraleigh were dead; that appellees Louis A., Albert E., Lillie F., Alliéne, and Emily were the only surviving children of Mary A. Fraleigh, and were all over 21 years of age, except Alliéne and Emily, who were about 20 years of age. The consideration expressed in the deeds from Fraleigh and wife to Hamblin was \$700.

The bill prayed that the appointment of E. M. Fraleigh to be trustee, the deeds to Samuel Hamblin, and the deed to appellant be declared illegal, null and void; that appellant be required to produce the deeds in court for cancellation; that a trustee be appointed, vice Samuel B. Love, deceased,—and for general relief.

The separate answer of appellant to the amended bill of complaint filed May 19, 1891, admitted the execution of the trust deed by E. M. Fraleigh; the appointment of E. M. Fraleigh to be trustee by Mary A. Fraleigh; the resignation of S. B. Love as trustee; that appellant was in possession of certain land described in the trust deed, and claimed same under a deed from Samuel Hamblin, who acquired title to same by deeds from Mary A. Fraleigh and Emanuel M. Fraleigh, as trustee,—and denied that the property had run down or was going to waste, that the lands passed to Hamblin for little or no consideration, that the proceeds of sale were not reinvested as required by the trust deed, and that appellant knew that fact.

Appellant by his answer also denied all charges of combination and confederacy made against him in the bill, and alleged that he purchased the lands mentioned in the bill from Samuel Hamblin in March,

1878, in good faith, and without notice of any equities claimed by appellees, paying therefor the sum of \$1,500.

The case was set down for hearing on amended bill and answer of appellant, and on November 4, 1893, a decree was rendered whereby it was decreed that the appointment of E. M. Fraleigh to be trustee, by Mary A. Fraleigh, his wife, was illegal, null, and utterly void; that the deeds from E. M. Fraleigh, as trustee, and his wife, Mary A. Fraleigh to Samuel Hamblin, passed whatever right, title, or interest Mary A. Fraleigh might have had in the property attempted to be thereby conveyed, but did not pass any right, title, or interest of the children of Mary A. Fraleigh, and as to such children the deeds were absolutely null, void, and of no effect whatever; that the deed from Hamblin to appellant passed no title whatever to any lands embraced in the original trust deed, except the interest or estate which Mary A. Fraleigh had therein, and which she might have conveyed to Samuel Hamblin in the deeds to him before mentioned, and that for any other purpose, or to any other extent, the said deed from Hamblin to appellant was utterly null, void, and of no effect; that D. McMillan be, and he was thereby, appointed trustee, to take charge of, recover, and manage the lands described in the trust deed from Fraleigh to Love, so far as the interest and estate of the children of Mary A. Fraleigh extended, subject to the same trust and powers as mentioned in the original trust deed in respect to said children.

From this decree Stearns entered his appeal on March 24, 1894, to our June term, 1894, claiming in his petition of appeal that the court erred in decreeing (1) that the appointment of E. M. Fraleigh as trustee, by his wife, was illegal and void; (2) that the deeds from Fraleigh, trustee, and his wife, to Samuel Hamblin, did not pass to Hamblin any right or interest of Mary A. Fraleigh's children, but that as to them the deeds were absolutely null and void; (3) that the deed from Hamblin to appellant passed only the interest of Mary A. Fraleigh in the lands conveyed, and to any further extent was null and void; (4) the appointment of D. McMillan to be trustee.

CARTER, J. (after stating the facts). The appellant having failed to argue the fourth error assigned in the petition of appeal, we treat it as abandoned. The principal question involved by the other assignments is whether the appointment of E. M. Fraleigh to be trustee, by his wife, under the power of appointment given her by the terms of the trust deed, was a valid act. If so, and the deeds to Hamblin passed title, the appellant, being a purchaser for value from him, without notice of any equities claimed by appellees, would obtain a good title. *Saunders v. Richard*, 35 Fla. 28, 16 South. 679. The hearing in the court below was upon bill and answer, and it will be observed that the answer denied that the sale to Hamblin was for little or no consideration, that the proceeds of the sale had not been re-invested, and all charges of fraud and conspiracy on the part of ap-

pellant to obtain title to the property. The deeds to Hamblin expressed a consideration of \$700, and, in the absence of actual notice, the appellant could only be charged with constructive notice to the extent of that furnished by the record of the trust deed, and of those to Hamblin.

It is insisted by appellees that the appointment of E. M. Fraleigh to be trustee was void, because—First, the trustee, Love, could not, after having accepted the trust, resign or renounce it; second, a married woman cannot appoint her husband trustee of a trust created by him for the benefit of herself and children; third, the execution of the instrument of appointment was not joined in by Mrs. Fraleigh's husband, nor did she acknowledge its execution separate and apart from her husband.

1. The general rule, that a trustee cannot, after having accepted a trust, resign or renounce it at his pleasure, contended for by appellees, in unquestionably correct; but it is equally true that, where the instrument creating the trust empowers a trustee to resign after acceptance, a resignation in the manner pointed out by such instrument will be valid. 1 Perry, Trusts, § 274; 2 Lewin, Trusts, *646; Tiff. & Bul. Trusts, p. 536. It is not denied that the trust deed authorized Mr. Love to resign, nor that his resignation was in strict accordance with the authority; but the appellees ask us to construe the written resignation as a refusal to accept the trust, and it is insisted that Mrs. Fraleigh had no authority to appoint another trustee in case of Mr. Love's refusal to accept the trust, but only in the event of his resignation. The instrument expressly recites the fact that Mr. Love was holding property in trust, and it referred to the trust deed for a description of the property so held, and to its provisions authorizing him to resign. If he was holding the property in trust, as declared by this instrument, he had accepted the trusteeship, and the instrument was what it purported to be,—a resignation of the trust, and not a refusal to accept it.

2. It is argued by appellees that the appointment of E. M. Fraleigh as trustee of a trust created by him for his wife and children would defeat the object of the trust, and his acceptance would amount to a revocation thereof; and we are referred to the case of *Robinson v. Dart's Ex'rs*, Dud. Eq. (S. C.) 128, 31 Am. Dec. 569, and to the cases of *Richards v. Chambers*, 10 Ves. 580, *Magwood v. Johnson*, 1 Hill, Eq. (S. C.) 228, and *Ewing v. Smith*, 3 Desaus. (S. C.) 417, 5 Am. Dec. 557, cited therein, as sustaining this proposition. The last two cases have no reference to the question under consideration. The case of *Richards v. Chambers*, 10 Ves. 580, as quoted in the first-named case, would go far towards sustaining the contention of appellees, but a reference to the official report of the case shows that it sustains the contrary view. There, the property, by a marriage settlement, was secured to the sole and separate use of the wife for life,

and, if she survived her husband, to her absolutely; but, if she died before her husband, it was to go to such persons as she by will or deed might appoint, and in default of appointment, to her executors or administrators. The husband and wife by petition applied to have a part of the trust property then in court transferred to them; the wife having executed an appointment in favor of the husband, and expressed a desire, upon an examination *de bene esse*, that the petition be granted. The court said: "The wife, having a separate estate for life, might, according to the doctrine of many cases, part with that life interest. She might also execute an appointment in favor of her husband, or of any person, which appointment, in the event of her death in his life, would be a valid and effectual disposition of the property. But the question is whether the contingent interest which the wife, while *sui juris*, has secured to herself in the event of her surviving her husband, can, through the interposition of this court, be given up by her while in a state of coverture."

The question in that case was as to a contingent interest, over which the wife had no power of appointment by contract; and the proposition was distinctly recognized that she could exercise a power of appointment, even in favor of her husband. In *Robinson v. Dart's Ex'rs*, *Dud. Eq. (S. C.)* 128, application was made to a court of equity to appoint a husband trustee for his wife. The court declined to appoint him, or to direct that the wife's separate property be turned over to him; holding, not that he was incompetent or disqualified, but that he was an improper person to whom to commit the trusteeship. The reasons advanced by the court were that, if appointed, he would be constantly tempted to use the authority and influence of a husband to assume the disposal of the property to his own uses, and induce his wife's acquiescence, and that a court of equity should not place a wife in such a situation that she might be compelled to go into equity to call her husband to account for breaches of his duty as trustee. To the same effect, see *Boykin v. Ciples*, *2 Hill, Eq. (S. C.)* 200, 29 *Am. Dec.* 67; *Ex parte Hunter, Rice, Eq. (S. C.)* 293; *Dean v. Lanford*, *9 Rich. Eq. (S. C.)* 423. In none of the cases referred to by appellees was any question involved as to whether, under a power to appoint new trustees, a married woman could appoint her husband; nor was it held that a husband was incompetent or disqualified to be a trustee for his wife. There is a very clear and obvious distinction between the incompetency and the unfitness of a person for the position of trustee, and between the power of an individual to select a trustee, and the duty of a court in appointing one. *Forster v. Abraham*, *L. R.* 17 *Eq.* 351.

The general rule is that any person may be appointed a trustee who is capable of confidence, of holding real and personal property, and of executing the trust. 3 *Kerr, Real Prop.* § 1728; 1 *Perry, Trusts*, § 39; *Tiff. & Bul. Trusts*, 325. It is not denied that the hus-

band in this case was capable of everything required by the general definition, and that he was in fact a competent trustee for his children under the same deed. Then why not for his wife? In equity he has been frequently held to be a trustee for his wife, and prior to any recent statutes regulating married women's property, in all cases where real estate was conveyed direct to the wife during coverture, for her sole and separate use, exclusive of her husband, he was in equity deemed a trustee for the wife, and as such held the legal title. 2 Story, Eq. Jur. § 1380; 1 Bish. Mar. Wom. § 800; Porter v. Bank of Rutland, 19 Vt. 410; Bennet v. Davis, 2 P. Wms. 316; Conway v. Hale, 4 Hayw. (Tenn.) 1, 9 Am. Dec. 748; Walker v. Walker's Ex'r, 9 Wall. 743, 19 L. Ed. 814. And where an estate was given to, or engaged to be held by, a husband, for the use of his wife, the husband was thereby constituted a trustee for the separate use of the wife. Darley v. Darley, 3 Atk. 398; McLean v. Longlands, 5 Ves. 71; Rich v. Cockell, 9 Ves. 369; Walter v. Hodge, 2 Swanst. 92; 2 Story, Eq. Jur. § 1372.

While a court of equity, perhaps, would never have appointed Mr. Fraleigh to be trustee of the trust created by him for his wife and children, and would probably have removed him from the position, upon proper application, after he was appointed, yet there is no absolute rule of law rendering him incompetent to act in that capacity, if appointed by authority of the instrument creating the trust, or in any other legal manner. 1 Perry, Trusts, § 59; 1 Lewin, Trusts, *41. Neither did the appointment of Mr. Fraleigh, and his acceptance thereof, revoke the trust deed. On the contrary, his acceptance bound him to execute the trust according to its terms; and he was invested with the same power, and subject to the same responsibilities, as other trustees, and the wife was entitled to the same protection in equity as any other cestui que trust. 1 Bish. Mar. Wom. § 801; Walker v. Walker, 9 Wall. 743, 19 L. Ed. 814; 2 Story, Eq. Jur. § 1380; Tweedy v. Urquhart, 30 Ga. 446. In this latter case, by an antenuptial settlement between Ephraim Tweedy and Isabella Hadley, made in contemplation of marriage, certain personal property was conveyed to a trustee for the sole use of Isabella, "separate from and wholly free from the control of her intended husband, or any future husband," with a provision authorizing Isabella to appoint any other person trustee in the place of the one named in the deed, should he die or resign. The trustee having resigned, Isabella, then the wife of Tweedy, appointed her husband trustee, in accordance with the power contained in the deed. The court held that there was nothing in the relation of husband and wife, nor in the clause of the settlement in quotation above, depriving the wife of the right to appoint her husband trustee, under the power reserved in the settlement, and that his appointment was valid.

3. At common law a married woman could, without the concurrence of her husband, execute a power, whether the power was given to her while sole or married. 4 Kent, Comm. *324; *Gridley v. Wynant*, 23 How. 500, 16 L. Ed. 411; *Gridley v. Westbrook*, 23 How. 503, 16 L. Ed. 412; *Armstrong v. Kerns*, 61 Md. 364; *Thompson v. Perry*, 2 Hill, Eq. (S. C.) 204, 29 Am. Dec. 68; *Barnes v. Irwin*, 2 Dall. 199, 1 L. Ed. 348. And she could, in such cases, execute the power in favor of her husband. *Wood v. Wood*, L. R. 10 Eq. Cas. 220; *Taylor v. Eatman*, 92 N. C. 601; 3 Kerr, Real Prop. §§ 1857, 1859; *Richards v. Chambers*, 10 Ves. 580. As the appointment of a trustee in this case was the exercise of a mere power, and at common law a married woman could exercise such power without the assent of her husband, it only remains to be seen whether this rule of the common law, had been changed by any statute of this state at the time of the execution of the power in question in this case. We are very clearly of the opinion that it had not. The statutes in force at that time requiring the joinder of the husband, and a separate acknowledgment of the wife, were applicable only to transfers and conveyances of the wife's property. Act Feb. 4, 1835, § 1; Act March 6, 1845, § 4. The designation of a person to act as trustee, and hold the legal title to property of which she was a beneficiary, was not a transfer by her of the trust property, or any interest therein. Her appointment conferred no title upon her husband in the trust property. His title, powers, and duties were derived from, and determined by, the original trust deed, not from her appointment. Her power to appoint possessed none of the elements of an estate. *Norfleet v. Hawkins*, 93 N. C. 392; 4 Kent, Comm. 337; *Patterson v. Lawrence*, 83 Ga. 703, 10 S. E. 355, 7 L. R. A. 143; *Schley v. McCeney*, 36 Md. 266; 3 Kerr, Real Prop. §§ 1850, 1851; *Cranstone v. Crane*, 97 Mass. 459, 93 Am. Dec. 106.

4. It is also insisted that the substituted trustee acquired no title to the property which he could convey without a deed from the retiring trustee. The trust deed authorized the named trustee to resign. He did resign, and thereupon ceased to be trustee. Mrs. Fraleigh was authorized to choose and appoint another. She did so, and thereupon E. M. Fraleigh, by the express language of the trust deed, took the trusteeship, subject to the trust in the deed limited. Even if the trust property was not, by the language of the trust deed, effectually transferred to the new trustee upon his appointment, without a formal conveyance from Mr. Love, yet by his appointment Mr. Fraleigh became the rightful trustee, and as such could unquestionably have maintained actions against Mr. Love for conveyances and possession of the trust property. *Noble v. Meymott*, 14 Beav. 471; 2 Lewin, Trusts, *650. If the language of the trust deed was insufficient to vest title to the trust property in Mr. Fraleigh, but was sufficient to constitute him a trustee upon Mrs. Fraleigh's appointment, then the legal title remained

in Mr. Love, as a naked trust; and upon the execution of the power of sale contained in the trust deed by the new trustee, the title passed to the purchaser (at least, so far as the *cestuis que trustent* were concerned), by force of the terms of the trust deed granting power to sell, and by the deed of the new trustee executed under that power. *Bank v. Eldridge*, 115 Mass. 424.

The decree of the circuit court, except the paragraph appointing D. McMillan as trustee, is reversed, with directions to dismiss the bill and amended bill, as against the appellant. In other respects the decree is affirmed.

CITY OF OWATONNA v. ROSEBROCK.

(Supreme Court of Minnesota, 1903. 88 Minn. 318, 92 N. W. 1122.)

Appeal from district court, Steele county; Thomas S. Buckham, Judge.

Action by city of Owatonna against Carl J. H. Rosebrock and others. From a judgment for defendants, plaintiff appeals. Reversed.

LEWIS, J. On January 3, 1899, Herman Heinrich Rosebrock, a resident of Owatonna, died, leaving a will, the pertinent part of which reads as follows: "I give and bequeath the sum of five thousand dollars (\$5,000) to Carl J. H. Rosebrock (my son) and to Nicholas J. Schafer, in trust for the following purposes, to wit: It is my desire and purpose to aid in the maintaining of a kindergarten in the city of Owatonna, Minnesota, and that the said sum of five thousand dollars (\$5,000) shall constitute an endowment in perpetuity for that purpose. Said sum is therefore given to said persons in trust to invest, reinvest, and loan the same from time to time in such manner as my said trustees or their successors may deem best, with full power to change any investment thus made, and to pay over the income, less the expense of administering the trust, to be used as to them shall seem most expedient for the conducting of a kindergarten in the city of Owatonna, Minnesota: provided, that whenever the city of Owatonna aforesaid, or any officer or officers thereof, shall be legally authorized to receive and administer such a trust as hereby created (in perpetuity), that the trust hereby created shall be transferred to said city of Owatonna, or the proper officer or officers thereof, who shall be charged with the management of said trust in the same manner as the said trustees hereby appointed by me; and said trustees shall, upon turning over the funds with which they are charged, be relieved from further responsibility with relation to said trust."

The will was duly allowed and probated, and the son, Carl J. H. Rosebrock, duly qualified as executor. The estate was administered, and the sum of \$8,629.20 in excess of the amount required to pay all bequests remained in the hands of the executor, and the probate court made the following decree: "To Carl J. H. Rosebrock and Nicholas J.

Schafer, in trust, the sum of five thousand (\$5,000) dollars, said sum to constitute an endowment in perpetuity to aid in maintaining a kindergarten in the city of Owatonna, Minnesota, and said sum to be controlled and managed according to the provisions of item 8 of said last will and testament, reference being made thereto." The money remained in the hands of the executor, and nothing was done towards carrying out the terms of the trust. On July 16, 1901, the common council of the city of Owatonna passed a resolution accepting the trust for the purpose for which it was made, and appointed the mayor, city recorder, and city treasurer, and their successors in office, to receive and receipt for the bequest, which, when received, should be paid into the city treasury; and that such officers and their successors should invest and loan the money and use the income derived therefrom as in the will provided, all of which should be done under the direction of the city council, the proceeds thereof to be known as the "Rosebrock Kindergarten Fund." Thereafter the officers referred to demanded of the trustees payment of the money, together with interest and profits accrued thereon, and, the same having been refused, this action was brought to recover the amount.

The trial court found the facts as above outlined, but held as a conclusion of law that plaintiff was not the beneficiary of the trust created by the will, and not entitled to the fund in controversy. The respondents seek to sustain the conclusion of the court upon the following grounds: (1) That the provision in the will which provides for the transfer of the trust to the city of Owatonna at such time as it shall have acquired authority to administer it is not mandatory, but directory only. (2) That the city of Owatonna is not authorized by law to receive and administer such a trust, the beneficiary being uncertain. (3) That the cause was tried and submitted to the trial court by appellant upon the theory that the city was entitled to recover simply upon the ground that it was the beneficiary, and that it should not be permitted in this court to change its position, and recover upon the theory that it is in fact the trustee.

1. There is no reasonable ground for a division of opinion upon the first point mentioned. It is clearly expressed that the individual trustees were to be considered temporary only, and should surrender their trust to the city of Owatonna as soon as that city should be legally authorized to receive and administer it. Subdivision 6, § 4284, Gen. St. 1894, was in existence at the time of the execution of the will, but the purposes for which cities were authorized to receive bequests in trust did not include the one specified in the will, and an amendment to that effect was evidently anticipated by the testator. Subsequent to the probating of the will, chapter 95, Laws 1901, was enacted, which amended subdivision 6 by adding the words: "Or for the purpose of establishing and maintaining a kindergarten, or other school or institution of learning." By this amendment the city of Owatonna became legally

authorized to receive and administer the trust, and it was the intention of the testator that upon the happening of that event the individual primary trustees should surrender the fund. The testator undoubtedly preferred that the control of the fund and the expenditure of the income for the purpose mentioned should be in the city government rather than private persons. He may have contemplated that some controversy would grow out of the administration of the trust,—that its legality might be questioned,—and therefore preferred that the money should be in the hands of city authorities, where public policy and public spirit would tend to insure its safety and proper application to the destined purpose. Whatever may have been the reasons of the testator, it is only necessary to inquire for the purpose of discovering his actual intention, and there is no doubt of the purpose in this case.

2. Subdivision 6, as amended, confers upon cities and villages the authority to receive such benefits and devises, and to invest the same, for the purpose of establishing or maintaining a kindergarten; and the district court of the state is clothed with the power to enforce such trusts. The city is not the beneficiary; it is the trustee, and as such compelled to expend the income as directed by the will. In *Shanahan v. Kelly* (filed January 9, 1903) 88 Minn. 202, 92 N. W. 948, the law upon the subject of trusts was reviewed, and it was held that all trusts, including charitable trusts in personal property, are abolished, except as provided in chapter 43, Gen. St. 1894; and that all trusts, with the possible exception of those authorized by subdivision 6 of section 11, in order to be valid, must be definite and certain as to the beneficiary,—citing *Lane v. Eaton*, 69 Minn. 141, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559. But the beneficiary is not uncertain because the testator did not cause the fund to be applied to some particular kindergarten, or because at that time no kindergarten had been established within the city. It is the intent of the statute that a city may receive such a fund in trust, but that the manner of its application rests in the discretion of the city authorities. If the income is applied to the object expressed, it is immaterial whether the city acts independently or in conjunction with private persons in establishing or maintaining the school. And it is unreasonable to assume that the testator intended to limit the application of the fund merely to the aiding or assisting in maintaining a kindergarten, or that he contemplated that the fund could not be used at all unless there was at the time in fact a kindergarten of some kind already established. The purpose was to secure teaching by the kindergarten method, and the income of the fund to be applied so far as it would go, independently, if sufficient, or, if not, then in connection with other funds.

As we understand the position of respondent, he does not attack the validity of this trust, but assumes that under the provisions of the will he himself was the party authorized to administer it. But if the city could not be compelled to administer the trust because of an uncertain and indefinite beneficiary, then, for the same reasons, respondent him-

self could not be compelled to administer it. It is unnecessary at this time to decide who would be the proper party to compel the application of the income for the purpose specified should the city show a disposition to misapply or squander the fund. There will be time enough to decide that question when it is definitely before us. The proviso attached to section 2484 in reference to perpetuities has no application to bequests of this character to a municipality, they being expressly authorized.

3. It would seem from the statements made in respondent's brief, and from certain language found in the memorandum, that the trial court assumed this action was brought upon the theory that the city was in fact the beneficiary, and not the trustee. It does not appear clearly from the record that any change of positions was taken by counsel for appellant during the progress of the trial, or that those now pressed before this court were not presented, or abandoned, at the trial below. The facts are fully stated in the complaint, and the relief demanded must be granted if the statute and the will bear the interpretation we have given them. If the appellant city is in fact the trustee, and has been authorized by the statute to receive and administer the trust fund, and respondent has such fund in his possession, unused, the only thing to do in order to transfer the trusteeship from the one to the other is to transfer the fund itself. No finding of the court was necessary to declare the city the trustee, for the law has made it such, and, although the prayer for relief is limited to a demand for an accounting and paying over of the amount of money in the hands of respondent, such accounting and paying over is all that in fact remains to be done.

Judgment reversed, and cause remanded, with directions to the trial court to amend its conclusions of law so as to direct judgment to the effect that respondent turn over the trust fund to the city of Owatonna, to be held by it in trust for the purpose stated in the will.

LAWRENCE v. LAWRENCE.

(Supreme Court of Illinois, 1899. 181 Ill. 248, 54 N. E. 918.)

Error to circuit court, Logan county; C. Epler, Judge.

Bill by John T. and Frances Lawrence against Jay Lawrence and others to cancel a trust deed and expunge it from record. There was a decree in favor of complainants, and defendants bring error. Reversed.

On the 12th day of August, 1868, the defendants in error, who are husband and wife, as parties of the first part and grantors, and one Eliza A. Lawrence, as party of the second part and grantee, executed a certain trust deed and acknowledged the same in compliance with the statute then in force with reference to the valid execution of instruments for the conveyance of real estate. By said deed said

defendants in error conveyed certain lands in Logan county to the said Eliza A. Lawrence, as trustee, to "hold the legal estate or title in the said premises to the sole and separate use and benefit of Frances Lawrence, wife of the said John T. Lawrence, for and during the natural life of the said Frances Lawrence, with full and absolute right to the said Frances Lawrence, during her lifetime, to enjoy the use, rents, issues, and profits thereof, and upon her decease to hold the same to the sole and separate use and benefit of the said John T. Lawrence for and during his natural life, with full power to the said John T. Lawrence, during his lifetime, to enjoy the rents, issues, and profits thereof, provided he shall survive his said wife, but, if he shall not survive his said wife, then in trust upon the decease of the said Frances Lawrence to reconvey said premises, by a good and sufficient conveyance, to the legal heirs of him, the said John T. Lawrence." The deed also contained the following provision: "And it is further provided that in case of the decease of the said party of the second part, or her legal incapacity, before the full execution, discharge, and performance of, all and singular, the trusts in and by this deed created and declared, then the trust herein created shall be executed, discharged, or performed by the court of chancery having jurisdiction within and for the county of Logan; and upon the happening of either of the contingencies last aforesaid the estate granted and conveyed in and by this deed shall vest in such court, subject to, all and singular, the trusts and confidences in this deed created and declared, and said court shall exercise the same powers, and perform, all and singular, the trusts that may remain unexecuted, and perform with the same legal effect as the said party of the second part might or could were he capable of performing the same in such manner as said court may order and decree."

On the 15th day of August, 1896, the defendants in error exhibited their bill in chancery in the circuit court of Logan county, praying for a decree declaring the said deed to be null and void, and canceling the same and expunging it from the record. The bill alleged the said Eliza A. Lawrence had departed this life; that the complainants were in the possession of the said premises when the said deed was executed, and have ever since remained in possession thereof; that the defendants to the bill (plaintiffs in error) are the children of the said defendants in error. The further allegations of the bill are as follows: "Orators further represent that said trust deed is void because—First, the same was made without consideration for the execution thereof; second, because the said deed contained no provision by which the same might be canceled at the election of the grantors; third, that at the time said deed was executed they did not know that said deed did not contain a provision whereby the said deed might be canceled; fourth, that neither of orators comprehended the legal effect of said deed at the time of the execution thereof." The adult

defendants suffered default. The minors answered by their guardian ad litem, submitting their rights to the consideration of the court, and demanding strict proof of the bill. The cause was heard on the bill, answers, proof taken before the master, and proofs heard in open court, and decree entered granting the relief prayed in the bill. The defendants to the bill have prosecuted this writ of error to reverse the decree.

Boggs, J. (after stating the facts). The estate of a trustee in the real estate which is the subject-matter of the trust is commensurate with the powers conferred by the trust, and the purposes to be effected by it. The trustee acquires whatever estate (even to a fee simple) is needed to enable him to accomplish the purposes of the trust. *Society v. England*, 106 Ill. 125; *West v. Fitz*, 109 Ill. 425; 27 Am. & Eng. Enc. Law, 110-113, 117. When the trustee is directed and empowered to convey the land to the objects of the settlor's bounty, the legal estate necessarily vests in the trustee. If a trustee is required to grant a fee, the fee must be conferred upon him. *Kirkland v. Cox*, 94 Ill. 400; *Society v. England*, supra. Where, as here, the trustee is required to convey the title to the beneficiaries on the happening of a certain event, the trust is not a passive or dry trust, and the statute of uses does not operate to vest the title in the usee. *Kirkland v. Cox*, supra; *Society v. England*, supra. The legal title to the premises here involved rested in the trustee. Upon her death the title did not remain in abeyance. Courts of equity may be vested with the power to appoint a successor to a trustee in whom title to lands may rest, but such title cannot descend to and vest in the courts of equity. The title held by the trustee in this instance upon her death passed to her legal heirs, subject to the trust. 27 Am. & Eng. Enc. Law, 92. Such heirs were necessary parties to any proceeding instituted for the purpose of divesting them of such title. *Skiles v. Switzer*, 11 Ill. 533.

The allegations of the bill are insufficient to justify a decree vacating the deed. The trust was a voluntary settlement for the benefit of the settlors during their natural lives with remainder in fee to and for the benefit of their heirs. It was perfectly created, so that nothing remained to be done by the settlors to give it effect, and it may be enforced without regard to the presence or absence of any further consideration. *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269.

The bill alleges that the grantors did not know the trust deed did not contain a revoking clause. But there is no averment that they desired or expected such a clause to be inserted, or that accident, mistake, or fraud in any way intervened. It is not indispensable to a voluntary settlement that it should contain a power of revocation. "There is no such rule that the want of a power of revocation in a voluntary settlement, or the want of advice as to the insertion of such a power, will afford ground in equity for the donor to set aside such a settlement, but that the same is a circumstance, and a circumstance

merely, to be taken into account in determining upon the validity of the settlement, and of more or less weight according to the facts of each particular case." *Finucan v. Kendig*, 109 Ill. 198; *Patterson v. Johnson*, 113 Ill. 559.

The allegation that the grantors did not comprehend the legal effect of the instrument furnished no reason for vacating it. The bill does not allege that the legal effect was different from what it was intended it should be, or that the grantors understood it would have any different effect from that which the law would give it. There is no averment of mistake, misapprehension, or misunderstanding as to the purport and effect of the deed. The court, however, found the deed had not been delivered. The decree was entered upon proofs taken and reported by the master, and proofs heard in open court. There is no certificate of evidence; hence, we cannot know what testimony was produced orally. In such state of case, we must assume the findings of the court were supported by adequate proof. Waiving the application of the rule that the allegations of a bill and the proof must correspond, and that a party is not entitled to relief, though the evidence may warrant it, unless there are averments in the bill to which the evidence may apply, we are of opinion the decree cannot be supported on the ground that there was no delivery of the deed. When a decree in chancery granting affirmative relief is brought into review on error or appeal, the rule is that the decree must be supported by testimony preserved in the record, or by the facts appearing from specific findings of fact recited in the decree. *Bank v. Baker*, 161 Ill. 281, 43 N. E. 1074. The decree recites that the deed was prepared by an attorney who was acting on behalf of the trustee, and as to the delivery thereof the facts are found and recited as follows: "Said attorney, without explaining the contents of the said deed or the legal effect thereof, delivered said deed to complainant John T. Lawrence, who, together with his wife, Frances Lawrence, executed and acknowledged the same before a justice of the peace; and after said deed had been signed by the trustee, Eliza A. Lawrence, with whom both of said complainants were then living, complainant left said deed with the recorder of Logan county to be recorded, under the instructions and directions of said attorney." The law presumes much more in favor of the delivery of deeds in case of voluntary settlements than in ordinary cases of bargain and sale. *Insurance Co. v. Campbell*, 95 Ill. 267, 35 Am. Rep. 166; *Williams v. Williams*, 148 Ill. 426, 36 N. E. 104. No formal delivery to the grantee or trustee in person is necessary. The intention of the party is the controlling element. *Walker v. Walker*, 42 Ill. 311, 89 Am. Dec. 445.

Here it appears from the findings of the court the deed was prepared by an attorney who was acting for the trustee, and who, after it was prepared and was ready to be executed, handed it to the defendant in error John T. Lawrence; that said defendants in error

then executed and acknowledged it; that it was then signed by the trustee; and that the defendant in error John T. Lawrence, by the instruction and direction of the attorney of the said trustee, took the deed to the recorder of deeds, and left it with him to be recorded. The deed was duly spread of record by the proper recorder of deeds 2 days after it had been executed, and more than 28 years before the bill to cancel it was exhibited. No fact is recited tending to show that it was not the intention of the grantors to deliver the deed, and in such state of case the act of the grantors in delivering the deed to the recorder to be recorded, in obedience to the directions of the trustee, through her attorney, was equivalent to the manual delivery of the deed to the trustee. "Leaving the deed to be recorded will be a good delivery, if done with the knowledge of the grantee, and with the evident or expressed intention that the title is to pass to the grantee." 5 Am. & Eng. Enc. Law, 447; *Weber v. Christen*, 121 Ill. 91, 11 N. E. 893, 2 Am. St. Rep. 68.

The decree must be reversed, and the cause remanded. Reversed and remanded.

III. Implied Trusts *

1. RESULTING TRUSTS

MCDONOUGH v. O'NIEL.

(Supreme Judicial Court of Massachusetts, 1873. 113 Mass. 92.)

GRAY, C. J. The decision of this case depends upon the application to the evidence of well settled rules of equity jurisprudence.

Where land conveyed by one person to another is paid for with the money of a third, a trust results to the latter, which is not within the statute of frauds. It is sufficient if the purchase money was lent to him by the grantee, provided the loan is clearly proved. And the grantee's admissions, like other parol evidence, though not competent in direct proof of the trust, are yet admissible to show that the purchase money, by reason of such loan or otherwise, was the money of the alleged cestui que trust. *Kendall v. Mann*, 11 Allen, 15; *Blodgett v. Hildreth*, 103 Mass. 484; *Jackson v. Stevens*, 108 Mass. 94. In equity, a conveyance absolute on its face may be shown by parol evidence to have been intended as a mortgage only, and its effect limited accordingly. *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671. The findings of a master in matters of fact are not to be reviewed by the court, unless clearly shown to be erroneous. *Dean v. Emerson*, 102 Mass. 480. And in equity, as at law, the omission of a party to testify in control or explanation of testimony given by

* For discussion of principles, see *Burdick*, Real Prop. §§ 127-129.

others in his presence is a proper subject of consideration. *Whitney v. Bayley*, 4 Allen, 173.

It appears and is not controverted that the deed was made by Godfrey to the defendant, whose wife was the testator's sister; that the purchase money was \$3,000, of which the testator furnished \$300 of his own money, and \$200 borrowed by him of Mrs. McGovern, upon a note signed by himself and the defendant; the defendant furnished \$600 of his own money, and \$400 borrowed of Dolan upon the defendant's note; and for the remaining \$1,500 the defendant gave his own note, secured by mortgage on the premises, to Clements, who held a previous mortgage for a like amount, and who testified that before the purchase the defendant came to see if that mortgage could lie on the property, and told him that he was going to buy the land for the testator, and was told by the mortgagee that he must give a new mortgage, as he afterwards did, in discharge of the old one. The will recites that the defendant held a deed of certain real estate in trust for the testator's benefit, and had paid certain sums of money on his account, and directs that all such sums of money, with interest, should be paid back to him, and he should then convey the property in fee to the testator's wife. The attorney who drew the will certifies that he read this part of it in the testator's presence, and before its execution, to the defendant, and asked him if it was right, and he said it was, and upon being asked what claims he had against the place, answered \$600, besides \$100 for repairs and \$44.08 for taxes, and that he had received from the testator the whole amount with interest of the note to Dolan, except \$80, and that the testator had paid the note to Mrs. McGovern. The other material testimony may be taken as stated on the defendant's brief, namely, that the defendant repeatedly "admitted that he bought the place for John B. McDonough and that he meant to assist or help him;" that "the defendant said McDonough wanted him to buy the place for him," "that he had always wanted John to take the deed, but he had not paid up;" and "that he was ready to fix up the place when McDonough was ready to pay up." The master also reports that the defendant was present at the hearing before him, but did not offer to testify.

From this evidence the master, who heard all the witnesses, was warranted in finding as matter of fact that the money paid by the defendant for the land was lent by him to the plaintiff for the purpose, and that thus the whole purchase money was the plaintiff's money. Upon examination of the whole evidence, we see no sufficient cause for reversing the conclusion of the master; and taking the facts as found by him, the inference of law follows that there was a resulting trust in favor of the testator, and that there must be a decree for the plaintiff.

IV. Incidents of Equitable Estates †

1. MERGER

NELLIS v. RICKARD.*

(Supreme Court of California, 1901. 133 Cal. 617, 66 Pac. 32, 85 Am. St. Rep. 227.)

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by S. C. Nellis against K. C. Rickard and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

CHIPMAN, C. Action to quiet title. Plaintiff had judgment, from which, and from the order denying motion for new trial, defendants appeal.

Defendant Mattie S. Rickard claims title under deed of trust from her father, Dr. Richard H. McDonald, to her, June 27, 1891. She was at the time the wife of John C. Spencer, and had four children living, and they are still living. She had no other child. These children were born, respectively, at the following dates: November 28, 1879, October 10, 1881, October 15, 1883, March 15, 1885. She was divorced from Spencer, and married her co-defendant, Kenneth C. Rickard, with whom she is now living. Dr. McDonald was a member of his daughter's household in June, 1891. Plaintiff was a judgment creditor of McDonald, and claims under execution sale and sheriff's deed of date subsequent to 1891. The deed of trust is between Dr. McDonald, party of the first part, and Mattie S. Spencer, party of the second part, and recites that Mrs. Spencer (now Mrs. Rickard) is the grantor's daughter, and that "in consideration of the affection which the party of the first part has for her children, and the trust reposed in her, he does by these presents give, grant, and convey unto the party of the second part [the lands in controversy]; to have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part in trust for the uses and purposes herein set forth and none other, to wit, to possess, control, and have the income of said property during the natural life of the said party of the second part, and upon her death then the net income of said property shall belong to her children, share and share alike, except in case of the death of any such child or children leaving issue, then the share otherwise going to such child or children shall go to the issue of such child or children until the young-

† For discussion of principles, see Burdick, Real Prop. § 134.

* Rehearing denied September 10, 1901.

est child of the party of the second part arrives at the age of 25 years; thereupon the said property shall vest in fee share and share alike in said children, and the issue of the aforesaid child or children if any there be. The said party of the second part or her aforesaid successors shall have no power to alienate, incumber, or create a lien on said property, or to lease the same for a term to exceed five years, and the income of said property shall be paid monthly."

To rescue the deed entirely from the operation of the statute against perpetuities, or, if this cannot be done, to give it effect to some extent, appellants contend: First. That the deed conveyed the legal life estate to the grantor's daughter, Mrs. Spencer, free of any trust; and, if a trust was created, Mrs. Spencer's interest is severable from the trust for the children, and would not be affected by any invalidity of the latter trust. Second. If the deed created a trust of the remainder after the life estate, it was for the benefit only of children living at the date of the deed, and therefore did not contravene the statute. But, even if it included after-born children, it may be construed as limiting its benefits to children in being, and it is the duty of the court so to construe the deed if thereby a violation of the statute may be prevented. Third. That no trust was created for the children, but the title vests in them at the mother's death, subject at most to certain restrictions on their mode of enjoyment until the youngest shall have arrived at the age of 25 years. Fourth. If the deed attempted to create a trust of the remainder for all the children of Mrs. Spencer, and such trust would be void, still the gift to the children takes effect and will be upheld, the trust being disregarded; that in no aspect of the deed was any interest or reversion left in McDonald, or acquired under execution sale against him.

It is undoubtedly true, as a general proposition, that, where an equitable estate and a legal estate meet in the same person, the former is merged in the latter, if the two estates are commensurate and co-extensive, and if the merger is not contrary to the intention of the parties. Lewin, *Trusts*, pp. *14, *665; Perry, *Trusts*, §§ 13, 347. And, ordinarily, a cestui que trust should not be appointed trustee. But the authorities hold that a cestui que trust is not absolutely incapacitated from being a trustee, "as the court itself, under special circumstances, appoints a cestui que trust a trustee. The question is one merely of relative fitness." Lewin, *Trusts*, p. *665; Perry, *Trusts*, §§ 59, 297, and cases cited; *Tyler v. Mayre*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196, where a trustee was also a beneficiary.

Respondent contends that there could be no merger in this case, because the beneficiary takes no interest in the estate, and there was no estate to merge, the entire legal and equitable title passing by the deed to the trustee, the beneficiary having only the right to have the trust enforced. In *re Walkerly's Estate*, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97. It is not necessary to decide these questions.

We think a trust was intended to be created and was created, but it is not a single trust constituting an indivisible scheme for the disposition of the grantor's property, and incapable of being considered by its several parts. The deed establishes: (1) A trust for the benefit of Mrs. Spencer, by which she was to have the incomes of the property during her natural life; and the only restraint put upon her related to the disposition of the corpus of the estate. There was no restriction whatever as to the incomes, all of which she was to enjoy during her natural life. As there was here no restraint on alienation beyond lives in being, the trust as to her did not contravene the statute. (2) A further trust was established by which at Mrs. Spencer's death her children, and the issue of such children, were to enjoy the net incomes of the property until a certain period, when the fee was to vest in the survivors.

As to this latter trust, it is urged by respondent that the alienation was suspended beyond the legal period, and is not only void, but that its invalidity taints the entire instrument, in consequence of which the whole trust must be held void, and that the property was subject to execution on plaintiff's judgment against the grantor of the trust deed. If it be true that the trust created by the deed is of such a nature as to make it indivisible, and incapable of being carried out, as to that trust which is clearly legal, because of the alleged invalidity of the other trust, and if the other trust is in fact illegal, plaintiff's contention would be sound. But, as we think the trusts are severable, it becomes immaterial whether or not the trust as to the children is valid. The children are not made parties. All the parties to the trust are living. The judgment here as to Mrs. Spencer's interest will not affect the rights of the children after her interest ceases. We need not, therefore, determine the children's rights, in the event of Mrs. Spencer's death, should they or any of them outlive her.

In *Re Hendy's Estate*, 118 Cal. 656, 50 Pac. 753, the testator left a bequest of \$5,000 to his niece, Mrs. Green, to be held in trust by his executors for her benefit, and the interest to be paid her monthly, and at her death "the same to be continued to her two children, Harold and Mildred Green, until they are each twenty-five years of age, when the five thousand dollars shall be paid to them share and share alike." Mrs. Green petitioned to have the legacy distributed to her absolutely, on the assumption that the trust declared was void for undue suspension of the power of alienation. Civ. Code, § 715. It was held that the will did not create a single trust, but established (1) a trust for the benefit of Mrs. Green, and (2) a trust for the benefit of her two children. And it was said: "Harold and Mildred were in being at the creation of the trust, and are still living, and in their minorities. Therefore whatever conclusion may be reached as to the validity of the trust for the children, it is obvious that there can be no legal objection advanced against the trust to Mrs. Green. * * *

It is manifest, therefore, that the decree awarding Mrs. Green five thousand dollars as an absolute legacy must be reversed; since, the trust, as to her, being valid, and distinct from that on behalf of the children, the utmost she would be entitled to receive in any event would be the income from the fund during her life. The future disposition of the principal of the fund would concern only the children and the residuary legatees." It is true that the court proceeded to show that the trust to the children also was valid, and it is hence urged by respondent that the case is not decisive of the present one. As we understand the decision, however, there was a clear and distinct expression of belief that the invalidity of the trust to the children would make no difference in the conclusion as to Mrs. Green's rights. And the court disposed of the other aspect of the case because the matter was in probate, and seemed to call for a settlement of the children's rights, and not because it had any necessary bearing on the trust as to Mrs. Green.

We are unable to distinguish between that case and the present one; and, besides, we are satisfied upon authority and upon reason that the trust as to Mrs. Spencer should be upheld. Mr. Gray says in his *Rule against Perpetuities* (section 341): "When the settlor or testator has himself separated the contingencies, there is no difficulty in regarding the gifts separately, and upholding one, although the other fails; and the courts naturally and properly lean to construing the gifts separately when it can be done." It was stated as the rule in *Harrison v. Harrison*, 36 N. Y. 543, that it is no objection that the limitations, as well those which are good as the one alleged to be bad, are embraced in a single trust. Such trust, created for two purposes, one lawful and the other unlawful, is good for the lawful purpose, though void as to the unlawful one. *Amory v. Lord*, 9 N. Y. 403, was referred to and distinguished because in that case "the estate in the rents and profits, etc., devised for the benefit of the children, and the remainder in fee to the grandchildren, were so mixed up with and dependent upon the illegal and void one [the life estate in the surviving husband or wife] that it was impossible to sustain the one without giving effect to the other." That is precisely the distinction we find in the numerous cases on the subject where there is apparent conflict. If the several trusts are not so interdependent as that neither one can be dealt with without giving effect to all the others, the court will sort out the good from the bad, and give effect to the valid trusts. It was said by the court in *Van Schuyver v. Mulford*, 59 N. Y. 426, where previous similar cases were re-examined, that, "if the estate was vested under the will in a trustee upon several independent trusts, some of which are legal while others are in contravention of the statute regulating uses and trusts, or the statutes against perpetuities, the estate of the trustee will be upheld to the extent necessary to enable him to execute the valid trusts, and will only be void as to the illegal

or invalid trusts." The rule was thus expressed in *Tiers v. Tiers*, 98 N. Y. 568: "The rule is quite well settled that an ulterior limitation, though invalid, will not be allowed to invalidate the primary dispositions of the will, but will be cut off in the case of a trust which is not an entirety, as well as in the case of a limitation of a legal estate." That this is the generally accepted rule we think there is no doubt.

Looking at the deed before us, what seems to us to be intended as the primary trust is the trust for the benefit of Mrs. Spencer, and that the ulterior contingent limitation is easily separable from the primary trust, and is but incidental, its purpose being to provide for a contingency which may never arise, since Mrs. Spencer may outlive all her children, and the failure of the provision as to them would not affect the trust as to her. The judgment and order should be reversed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

V. Charitable or Public Trusts *

1. DEFINITION

JACKSON v. PHILLIPS.

(Supreme Judicial Court of Massachusetts, 1867. 14 Allen, 539.)

Bill in equity by the executor of the will of Francis Jackson, of Boston, for instructions as to the validity and effect of the following bequests and devises:

"Article 4th. I give and bequeath to William Lloyd Garrison, Wendell Phillips, Edmund Quincy, Maria W. Chapman, L. Maria Child, Edmund Jackson, William I. Bowditch, Samuel May, Jr., and Charles K. Whipple, their successors and assigns, ten thousand dollars; not for their own use, but in trust, nevertheless, for them to use and expend at their discretion, without any responsibility to any one, in such sums, at such times and such places, as they deem best, for the preparation and circulation of books, newspapers, the delivery of speeches, lectures, and such other means as in their judgment, will create a public sentiment that will put an end to negro slavery in this country; and I hereby constitute them a board of trustees for that purpose, with power to fill all vacancies that may occur from time to time by death or resignation of any member or of any officer of said board. And I hereby appoint Wendell Phillips president, Edmund Jackson treasurer, and Charles K. Whipple secretary, of said board of trustees. Other be-

* For discussion of principles, see Burdick, Real Prop. § 135.

quests, hereinafter made, will sooner or later revert to this board of trustees. My desire is that they may become a permanent organization; and I hope and trust that they will receive the services and sympathy, the donations and bequests, of the friends of the slave.

"Article 5th. I give and bequeath to the board of trustees named in the fourth article of this will, their successors and assigns, two thousand dollars, not for their own use, but in trust, nevertheless, to be expended by them at their discretion, without any responsibility to any one, for the benefit of fugitive slaves who may escape from the slaveholding states of this infamous Union from time to time.

"Disregarding the self-evident declaration of 1776, repeated in her own constitution of 1780, that 'all men are born free and equal,' Massachusetts has since, in the face of those solemn declarations, deliberately entered into a conspiracy with other states to aid them in enslaving millions of innocent persons. I have long labored to help my native state out of her deep iniquity and her barefaced hypocrisy in this matter. I now enter my last protest against her inconsistency, her injustice, and her cruelty, towards an unoffending people. God save the fugitive slaves that escape to her borders, whatever may become of the commonwealth of Massachusetts!

"Article 6th. I give and bequeath to Wendell Phillips of said Boston, Lucy Stone, formerly of Brookfield, Mass., now the wife of Henry Blackwell of New York, and Susan B. Anthony of Rochester, N. Y., their successors and assigns, five thousand dollars, not for their own use, but in trust, nevertheless, to be expended by them, without any responsibility to any one, at their discretion, in such sums, at such times, and in such places, as they may deem fit, to secure the passage of laws granting women, whether married or unmarried, the right to vote; to hold office; to hold, manage, and devise property; and all other civil rights enjoyed by men; and for the preparation and circulation of books, the delivery of lectures, and such other means as they may judge best; and I hereby constitute them a board of trustees for that intent and purpose, with power to add two other persons to said board if they deem it expedient. And I hereby appoint Wendell Phillips president and treasurer, and Susan B. Anthony secretary, of said board. I direct the treasurer of said board not to loan any part of said bequest, but to invest, and, if need be, sell and re-invest, the same in bank or railroad shares, at his discretion. I further authorize and request said board of trustees, the survivors and survivor of them, to fill any and all vacancies that may occur from time to time by death or resignation of any member or of any officer of said board. One other bequest, hereinafter made, will sooner or later, revert to this board of trustees. My desire is that they may become a permanent organization, until the rights of women shall be established equal with those of men; and I hope and trust that said board will receive the services and sympathy, the donations and bequests, of the friends of human rights. And being desirous that said board should have the immediate benefit

of said bequest, without waiting for my exit, I have already paid it in advance and in full to said Phillips, the treasurer of said board, whose receipt therefor is on my files.

"Article 8th. I now give to my three children equally the net income of the residue of my estate, during the term of their natural lives, in the following manner, namely: After the payment of my debts and the foregoing gifts and bequests, I give, bequeath and devise one undivided third part of the residue of my estate, real, personal and mixed, to my brother Edmund Jackson of said Boston, his successors and assigns, not for his or their own use, but in trust, nevertheless, with full power to manage, sell and convey, invest and re-invest, the same at his discretion, with a view to safety and profit;" and "the whole net income thereof shall be paid semi-annually to my daughter Eliza F. Eddy, during her natural life;" and at her decease, one-half of such income to be paid semi-annually "to the board of trustees constituted in the sixth article of this will, to be expended by them to promote the intent and purpose therein directed," and the other half to Lizzie F. Bacon, her daughter, during her natural life; and at the decease of both mother and daughter, "to pay and convey the whole of said trust fund to said board of trustees constituted in the sixth article of this will, to be expended by them in the manner, and for the intent and purpose, therein directed."

By article 9th, the testator gave another undivided third part of the said residue to his brother Edmund, his successors and assigns, in trust, with like powers of management and investment, "and the whole net income thereof shall be paid semi-annually to my son James Jackson, during the term of his natural life; at his decease, I direct said trustee, or whoever may then be duly qualified to execute this trust, to pay semi-annually one-half part of the net income thereof to the board of trustees constituted in the fourth article of this will, and the other half-part of said net income shall be paid semi-annually to his children equally, during their natural lives; at the decease of all his children, if they survive him, I direct said trustee, or whoever shall then be duly authorized to execute this trust, to pay and convey the whole of said trust fund to said board of trustees constituted in said fourth article in this will, to be expended by them for the intent and purpose directed in said fourth article; but, in case my said son James should leave no child living at the time of his decease, then, at his decease, I direct said trustee, or whoever shall then be duly authorized to execute this trust, to pay and convey the whole of said trust fund to said board of trustees constituted in the fourth article of this will, to be expended by them for the intent and purpose therein directed."

* By article 10th, the testator made a similar bequest and devise of the remaining undivided third part of said residue to his brother George Jackson, his successors and assigns, and in trust to pay the whole net income thereof semi-annually to the testator's daughter Harriette M. Palmer, during her natural life, and at her decease, one half of such

income "to the board of trustees constituted in the fourth article of this will, to be expended by them in the manner and for the intent and purpose therein directed;" and the other half, in equal proportions, to all her children that may survive her, during the term of their natural lives; and, at their decease, to pay and convey the whole of said trust fund to said board of trustees; "but, in case my said daughter Harriette M. Palmer should outlive all her children, then, at her decease, I direct said trustee, or whoever shall then be duly authorized to execute this trust, to pay and convey the whole of said trust fund to the board of trustees constituted in said fourth article in this will, to be expended by them as aforesaid."

GRAY, J. This case presents for decision many important and interesting questions, which have been the subject of repeated discussion at the bar and of much deliberation and reflection by the court. The able and elaborate arguments of counsel have necessarily involved the consideration of the fundamental principles of the law of charities, and of a great number of the precedents from which they are to be derived; and have disclosed such diversity of opinion upon the extent and application of those principles, and the just interpretation and effect of the adjudged cases, as to require the principles in question to be fully stated, and supported by a careful examination of authorities, in delivering judgment.

I. By the law of this commonwealth, as by the law of England, gifts to charitable uses are highly favored, and will be most liberally construed in order to accomplish the intent and purpose of the donor; and trusts which cannot be upheld in ordinary cases, for various reasons, will be established and carried into effect when created to support a gift to a charitable use. The most important distinction between charities and other trusts is in the time of duration allowed and the degree of definiteness required. The law does not allow property to be made inalienable, by means of a private trust, beyond the period prescribed by the rule against perpetuities, being a life or lives in being and twenty-one years afterwards; and if the persons to be benefited are uncertain and cannot be ascertained within that period, the gift will be adjudged void, and a resulting trust declared for the heirs at law or distributees. But a public or charitable trust may be perpetual in its duration, and may leave the mode of application and the selection of particular objects to the discretion of the trustees. *Sanderson v. White*, 18 Pick. 333, 29 Am. Dec. 591; *Odell v. Odell*, 10 Allen, 5, 6, and authorities cited; *Saltonstall v. Sanders*, 11 Allen, 446; *Lewin, Trusts*, c. 2.

Each of the bequests in the will of Francis Jackson which the court is asked in this case to sustain as charitable, is to a permanent board of trustees, for a purpose stated in general terms only. The question of the validity of these trusts is not to be determined by the opinions of individual judges or of the whole court as to their wisdom or policy, but by the established principles of law; and does not depend merely upon their being permitted by law, but upon their being of that peculiar

nature which the law deems entitled to extraordinary favor because it regards them as charitable.

It has been strenuously contended for the heirs at law that neither of the purposes declared by the testator is charitable within the intent and purview of St. 43 Eliz. c. 4, which all admit to be the principal test and evidence of what are in law charitable uses. It becomes necessary therefore to consider the spirit in which that statute has been construed and applied by the courts.

The preamble of the statute mentions three classes of charitable gifts, namely, First: For the relief and assistance of the poor and needy, specifying only "sick and maimed soldiers and mariners," "education and preferment of orphans," "marriages of poor maids," "supportation, aid and help of young tradesmen, handicraftsmen and persons decayed," "relief or redemption of prisoners and captives," and assistance of poor inhabitants in paying taxes, either for civil or military objects. Second: For the promoting of education, of which the only kinds specified in the statute (beyond the "education and preferment of orphans," which seems more appropriately to fall within the first class) are those "for maintenance of schools of learning, free schools, and scholars of universities." Third: For the repair and maintenance of public buildings and works, under which are enumerated "repair of ports, havens," and "seabanks," for promoting commerce and navigation and protecting the land against the encroachments of the sea; of "bridges," "causeways" and "highways," by which the people may pass from one part of the country to another; of "churches," in which religion may be publicly taught; and of "houses of correction."

It is well settled that any purpose is charitable in the legal sense of the word, which is within the principle and reason of this statute, although not expressly named in it; and many objects have been upheld as charities, which the statute neither mentions nor distinctly refers to. Thus a gift "to the poor" generally, or to the poor of a particular town, parish, age, sex, race, or condition, or to poor emigrants, though not falling within any of the descriptions of poor in the statute, is a good charitable gift. *Saltonstall v. Sanders*, 11 Allen, 455-461, and cases cited; *Magill v. Brown*, *Brightly*, N. P. 405, 406; *Barclay v. Maskelyne*, 4 Jur. (N. S.) 1294; *Chambers v. St. Louis*, 29 Mo. 543. So gifts for the promotion of science, learning and useful knowledge, though by different means and in different ways from those enumerated under the second class; and gifts for bringing water into a town, for building a town-house, or otherwise improving a town or city, though not alluded to in the third class: have been held to be charitable. *American Academy v. Harvard College*, 12 Gray, 594; *Drury v. Natick*, 10 Allen, 177-182, and authorities cited.

By modern decisions in England, gifts towards payment of the national debt, or "to the queen's chancellor of the exchequer for the

time being, to be applied for the benefit and advantage of Great Britain," are legal charities. Tudor, *Char. Trusts* (2d Ed.) 14, 15, and cases cited. Sergeant Maynard, long before, gave an opinion that a bequest "to the public use of the country of New England" was a good disposition to a charitable use. 1 Hutch. Hist. Mass. (2d Ed.) 101, note. And it may be mentioned as evidence of the use of the word "charitable" by the founders of Massachusetts, that it was applied by the Massachusetts Company in 1628, before they crossed the ocean, to "the common stock" to be "raised from such as bear good affection to the plantation and the propagation thereof, and the same to be employed only in defrayment of public charges, as maintenance of ministers, transportation of poor families, building of churches and fortifications, and all other public and necessary occasions of the plantation." 1 Mass. Col. Rec. 68.

No kind of charitable trusts finds less support in the words of St. 43 Eliz. than the large class of pious and religious uses, to which the statute contains no more distinct reference than in the words "repair of churches." Such uses had indeed been previously recognized as charitable, and entitled to peculiar favor, by many acts of parliament, as well as in the courts of justice. St. 13 Edw. I. c. 41; 17 Edw. II. c. 2; 23 Hen. VIII. c. 10; 1 Edw. VI. c. 14; Anon., And. 43, pl. 108; *Pitts v. James*, Hob. 123; *Cheney's Case*, Co. Litt. 342; *Gibbons v. Maltyard*, Poph. 6, Moore, 594; Coke's note to *Porter's Case*, 1 Coke, 26a; *Bruerton's Case*, 6 Coke, 1b, 2a; *Barry v. Ley*, Dwight, *Char. Cas.* 92. In the latest of those acts, the "erecting of grammar schools for the education of youth in virtue and godliness, the further augmenting of the universities, and better provision for the poor and needy," were classed with charities for the maintenance of preachers, and called "good and godly uses;" and grammar schools were considered in those times an effectual means of forwarding the progress of the Reformation. St. 1 Edw. VI. c. 14, §§ 1, 8, 9; Attorney General v. Downing, Wilm. 15; Boyle, *Char.* 7, 8.

Sir Francis Moore, who drew St. 43 Eliz., indeed says that a gift to maintain a chaplain or minister to celebrate divine service could not be the subject of a commission under the statute; but "was of purpose omitted in the penning of the act," lest, in the changes of opinion in matters of religion, such gifts might be confiscated in a succeeding reign as superstitious. Yet he also says that such a gift might be enforced by "the chancellor by his chancery authority;" and cites a case in which it was so decreed. Duke, *Char. Uses* (Bridgman's Ed.) 125, 154. And from very soon after the passage of the statute, gifts for the support of a minister, the preaching of an annual sermon, or other uses connected with public worship and the advancement of religion, have been constantly upheld and carried out as charities in the English courts of chancery. Anon., Cary, 39; Nash, *Char.*; Dwight, *Char. Cas.* 114; *Pember v. Inhabitants of Knighton*, Herne, *Char. Uses*, 101. Toth. (2d Ed.) 34; Duke, *Char. Uses*, 354, 356, 381, 570, 614; Boyle,

Char. 39-41; Tudor, Char. Trusts, 10, 11. So in this commonwealth, trusts for the support of public worship and religious instruction, or the spreading of religion at home or abroad, have always been deemed charitable uses. 4 Dane, Abr. 237; *Bartlet v. King*, 12 Mass. 537, 7 Am. Dec. 99; *Going v. Emery*, 16 Pick. 107, 26 Am. Dec. 645; *Sohier v. St. Paul's Church*, 12 Metc. 250; *Brown v. Kelsey*, 2 Cush. 243; *Earle v. Wood*, 8 Cush. 445.

It is not necessary in this connection to speculate whether the admission of pious uses into the rank of legal charities in modern times is to be attributed to the influence of the civil law; to their having been mentioned in the earlier English statutes; to a more liberal interpretation, after religion had become settled in England, of the words "repair of churches," or, possibly, of the clauses relating to gifts for the benefit of education, in St. 43 Eliz.; or to the support given by the court of chancery to public charitable trusts, independently of any statute. It is sufficient for our present purpose to observe that pious and religious uses are clearly not within the strict words of the statute, and can only be brought within its purview by the largest extension of its spirit.

The civil law, from which the English law of charities was manifestly derived, considered wills made for good and pious uses as privileged testaments, which were not, like other wills, void for uncertainty in the objects, and which must be carried into effect even if their conditions could not be exactly observed; and included among such uses (which it declared to be in their nature perpetual) bequests for the poor, orphans, widows, strangers, prisoners, the redemption of captives, the maintenance of clergymen, the benefit of churches, hospitals, schools and colleges, the repairing of city walls and bridges, the erection of public buildings, or other ornament or improvement of a city. Poth. Pand. lib. 30-32, Nos. 57-62; Code, lib. 1, tit. 2, cc. 15, 19; Id., tit. 3, cc. 24, 28, 42, 46, 49, 57; Godol. Leg. pt. 1, c. 5, § 4; 2 Kent, Comm. (6th Ed.) 257; 2 Story, Eq. Jur. §§ 1137-1141; *McDonogh v. Murdoch*, 15 How. 405, 410, 414, 14 L. Ed. 732.

Charities are not confined at the present day to those which were permitted by law in England in the reign of Elizabeth. A gift for the advancement of religion or other charitable purpose in a manner permitted by existing laws is not the less valid by reason of having such an object as would not have been legal at the time of the passage of the statute of charitable uses. For example, charitable trusts for dissenters from the established church have been uniformly upheld in England since the toleration act of 1 Wm. & M. c. 18, removed the legal disabilities under which such sects previously labored. *Attorney General v. Hickman*, 2 Eq. Cas. Abr. 193, W. Kel. 34; *Loyd v. Spillet*, 3 P. Wms. 344, 2 Atk. 148; *Attorney General v. Cock*, 2 Ves. Sr. 273. And in this country since the Revolution no distinction has been made between charitable gifts for the benefit of different religious sects.

Gifts for purposes prohibited by or opposed to the existing laws cannot be upheld as charitable, even if for objects which would otherwise be deemed such. The bounty must, in the words of Sir Francis Moore, be "according to the laws, not against the law," and "not given to do some act against the law." *Duke, Char. Uses*, 126, 169. So Mr. Dane defines, as undoubted charities, "such as are calculated to relieve the poor, and to promote such education and employment as the laws of the land recognize as useful." 4 *Dane, Abr.* 237. Upon this principle, the English courts have refused to sustain gifts for printing and publishing a book inculcating the absolute and inalienable supremacy of the pope in ecclesiastical matters; or for the support of the Roman Catholic or the Jewish religion, before such gifts were countenanced by act of parliament. *De Themmines v. De Bonneval*, 5 *Russ. Tudor, Char. Trusts*, 21–25, and cases cited. And a bequest "towards the political restoration of the Jews to Jerusalem and to their own land," has been held void, as tending to create a political revolution in a friendly country. *Habershon v. Vardon*, 4 *De Gex & S.* 467. In a free republic, it is the right of every citizen to strive in a peaceable manner by vote, speech or writing, to cause the laws, or even the constitution, under which he lives, to be reformed or altered by the legislature or the people. But it is the duty of the judicial department to expound and administer the laws as they exist. And trusts whose expressed purpose is to bring about changes in the laws or the political institutions of the country are not charitable in such a sense as to be entitled to peculiar favor, protection and perpetuation from the ministers of those laws which they are designed to modify or subvert.

A precise and complete definition of a legal charity is hardly to be found in the books. The one most commonly used in modern cases, originating in the judgment of Sir William Grant, confirmed by that of Lord Eldon, in *Morice v. Bishop of Durham*, 9 *Ves.* 405, 10 *Ves.* 541—that those purposes are considered charitable which are enumerated in St. 43 Eliz. or which by analogies are deemed within its spirit and intendment—leaves something to be desired in point of certainty, and suggests no principle. Mr. Binney, in his great argument in the *Girard Will Case*, 41, defined a charitable or pious gift to be "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private or selfish." And this definition has been approved by the supreme court of Pennsylvania. *Price v. Maxwell*, 28 *Pa.* 35. A more concise and practical rule is that of Lord Camden, adopted by Chancellor Kent, by Lord Lyndhurst, and by the supreme court of the United States—"A gift to a general public use, which extends to the poor as well as the rich." *Jones v. Williams*, *Amb.* 652; *Coggeshall v. Pelton*, 7 *Johns. Ch. (N. Y.)* 294, 11 *Am. Dec.* 471; *Mitford v. Reynolds*, 1 *Phil.* 191, 192; *Perin v. Carey*, 24

How. 506, 16 L. Ed. 701. A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.

If the words of a charitable bequest are ambiguous or contradictory, they are to be so construed as to support the charity, if possible. It is an established maxim of interpretation, that the court is bound to carry the will into effect, if it can see a general intention consistent with the rules of law, even if the particular mode or manner pointed out by the testator is illegal. *Bartlet v. King*, 12 Mass. 543, 7 Am. Dec. 99; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 117, 118, 7 L. Ed. 617. If the testator uses a word which has two meanings, one of which will effect and the other defeat his object, the first is to be adopted. *Saltonstall v. Sanders*, 11 Allen, 455. When a charitable intent appears on the face of the will, but the terms used are broad enough to allow of the fund being applied either in a lawful or an unlawful manner, the gift will be supported, and its application restrained within the bounds of the law. The most frequent illustrations of this in the English courts have arisen under St. 9 Geo. II. c. 36 (commonly called the "Statute of Mortmain"), prohibiting devises of land, or bequests of money to be laid out in land, to charitable uses. In the leading case, Lord Hardwicke held that a direction to executors to "settle and secure, by purchase of lands of inheritance, or otherwise, as they shall be advised, out of my personal estate," two annuities to be paid yearly forever for charitable objects, was valid, because it left the option to the executor to make the investment in personal property, which was not prohibited by the statute; and said, "This bequest is not void, and there is no authority to construe it to be void, if by law it can possibly be made good," or (according to another and perhaps more accurate report) "no authority to construe it to be void by law, if it can possibly be made good." *Sorresby v. Hollins*, 9 Mod. 221, 1 Coll. Jurid. 439.

The doctrine of that case has ever since been recognized as sound law. *Attorney General v. Whitchurch*, 3 Ves. 144; *Curtis v. Hutton*, 14 Ves. 539; *Dent v. Allcroft*, 30 Beav. 340; *Mayor, etc., of Faversham v. Ryder*, 5 De Gex, M. & G. 353; *Edwards v. Hall*, 11 Hare, 12, 6 De Gex, M. & G. 89. In a like spirit the house of lords recently decided that a bequest to erect buildings for charitable purposes if other lands should be given was valid, and could not be held to be impliedly prohibited by St. 9 Geo. II. *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338. The rule stated in *Attorney General v. Williams*,

2 Cox, Ch. 388, and *Tatham v. Drummond*, 11 L. T. (N. S.) 325, upon which the heirs at law rely, that "the court will not alter its conception of the purposes of a testator, merely because those intentions happen to fall within the prohibition of the statute of mortmain," shows that no forced construction of the testator's language is to be adopted to avoid illegality, but does not affect the principle that a bequest which according to the fair meaning of the words may include a legal as well as an illegal application is to be held valid.

In the light of these general principles, we come to the consideration of the language of the different bequests in this will.

II. The first bequest which is drawn in question is that contained in the fourth article of the will, by which the sum of ten thousand dollars is given in trust to be used and expended at the discretion of the trustees, "in such sums, at such times and such places as they deem best, for the preparation and circulation of books, newspapers, the delivery of speeches, lectures and such other means as in their judgment will create a public sentiment that will put an end to the negro slavery in this country;" and the testator expresses a desire that they may become a permanent organization, and a hope "that they will receive the services and sympathy, the donations and bequests, of the friends of the slave."

Among the charitable objects specially designated in St. 43 Eliz. is the "relief or redemption of prisoners and captives." And this was not a peculiarity of the law of England or of that age. The civil law regarded the redemption of captives as the highest of all pious uses—in the words of Justinian, *causa piissima*—and not only declared that no heir, trustee or legatee should infringe or unjustly defeat the pious intentions of the testator by asserting that a legacy or trust for the redemption of captives was uncertain, and provided for the appointment of a trustee when none was named in the will, and for informing him of the bequest, but even authorized churches to alienate their sacred vessel and vestments for this one purpose, upon the ground that it was reasonable that the souls or lives of men should be preferred to any vessels or vestments whatsoever—"Quoniam non absurdum est animas hominum quibuscunque vasis vel vestimentis preferri." Code, lib. 1, tit. 2, c. 22; Id., tit. 3, cc. 28, 49; Id., lib. 8, tit. 54, c. 36; Nov. 7, c. 8; Id., p. 115, c. 3; Id., p. 120, c. 10; Id., p. 131, c. 11; Godol. Leg. pt. 1, c. 5, § 4.

The captives principally contemplated in St. 43 Eliz. were doubtless Englishmen taken and held as slaves in Turkey and Barbary. And the relief of our own citizens from such captivity was always deemed charitable in Massachusetts, an illustration of which is found in the records of the governor and council in 1693, by whom a petition of the relations of two inhabitants of the province, "some time since taken by a Salley man of war, and now under Turkish captivity and slavery," for permission "to ask and receive the charity and public contribution of well disposed persons for redeeming them out of their

miserable suffering and slavery," was granted; "the money so collected to be employed for the end aforesaid, unless the said persons happen to die before, make their escape, or be in any other way redeemed; then the money so gathered to be improved for the redemption of some others of this province, that are or may be in like circumstances, as the governor and council shall direct." Council Rec. 1693, fol. 323. But there is no more reason for confining the words of the statute of Elizabeth to such captives, than for excluding from the class of religious charities gifts for preaching the gospel to the heathen, which have uniformly been sustained as charitable, here and in England. Boyle, Char. 41; Bartlet v. King, 12 Mass. 537, 7 Am. Dec. 99. Indeed it appears by Sir Francis Moore's reading upon the statute, that even in his time the word "captives" might include captive enemies. Duke, Char. Uses, 158.

It was argued that the slave trade was fostered and rewarded by the English government in the reign of Elizabeth, and therefore gifts for the relief of negro slaves could not be deemed within the purview of the statute of charitable uses. The fact is undoubted; but the conclusion does not follow. The permission of slavery by law does not prevent emancipation from being charitable. A commission of manumission, granted by Queen Elizabeth, twenty-seven years before the statute, recites that in the beginning God created all men free by nature, and afterwards the law of nations placed some under the yoke of slavery, and that the queen believed it would be pious and acceptable to God and according to Christian charity—"pium fore credimus et Deo acceptabile Christianæque charitati consentaneum"—to wholly enfranchise the villeins of the crown on certain royal manors. 20 Howell, St. Tr. 1372. See, also, Bar. Ob. (5th Ed.) 305, 308.

The spirit of the Roman law upon this point is manifested by an edict of Constantine, which speaks of those who with a religious sentiment in the bosom of the church grant their slaves that liberty which is their due—"Qui religiosâ mente in ecclesiæ gremio servis suis meritam concesserint libertatem." Code, lib. 1, tit. 13, c. 2. That the words of the statute of charitable uses may be extended to negro slaves of English masters is clearly shown by the decision of Lord Cottenham, when master of the rolls, applying for the benefit of negroes in the British colonies in the West Indies the accumulations of a bequest made in 1670 "to redeem poor slaves." Attorney General v. Gibson, 2 Beav. 317, note; Id., cited Craig & P. 226. In dealing with such a question, great regard is to be had to the favor which the law gives to liberty, so eloquently expressed by Chief Justice Fortescue: "*Crudelis enim necessario judicabitur lex, quæ servitutem augmentat et minuit libertatem. Nam pro eâ natura semper implorat humana. Quia ab homine et pro vitio introducta est servitus. Sed libertas a Deo hominis est indita naturæ. Quare ipsa ab homine sublata semper redire gliscit, ut facit omne quod libertati naturali privatur. Quo ipse et crudelis judicandus est, qui libertati non favet.*"

Hæc considerantia Angliæ jura in omni casu libertati dant favorem." Fortes. *De Laud.* c. 42.

But the question of the lawfulness of this gift, if falling within the class of charitable uses, depends not upon the laws and the public policy of England at the time of the passage of the statute, but upon our own at the time of the death of the testator. It was seriously argued that, before the recent amendment of the constitution of the United States, "a trust to create a sentiment to put an end to negro slavery, would, having regard to the constitution and laws under which we live, be against public policy and thus be void;" but the court is unable to see any foundation for this position in the constitution and laws, either of the United States or of this commonwealth.

The law of Massachusetts has always been peculiarly favorable to freedom, as may be shown by a brief outline of its history. The "rights, liberties and privileges," established by the general court of the colony in 1641, to be "impartially and inviolably enjoyed and observed throughout our jurisdiction forever," declared: "There shall never be any bond slavery, villenage or captivity amongst us, unless it be lawful captives taken in just wars, and such strangers as willingly sell themselves or are sold to us. And these shall have all the liberties and Christian usages which the law of God established in Israel concerning such persons doth morally require. This exempts none from servitude who shall be judged thereto by authority." The last proviso evidently referred to punishment for crime. Body of Liberties, art. 91. This article, leaving out the word "strangers" in the clause as to slaves acquired by sale, was included in each revision of the laws of the colony. Mass. Col. Laws (Ed. 1660) 5; Id. (Ed. 1672) 10; 4 Mass. Col. Rec. pt. 2, p. 467. It is worthy of observation, that the tenure upon which the Massachusetts Company held their charter, as declared in the charter itself, was as of the manor of East Greenwich in the county of Kent; that no one was ever born a villen in Kent (Y. B. 30 Edw. I, p. 168; Fitzh. Abr. "Villenage," 46; 3 Seld. Works, 1876); and that the Body of Liberties contained articles upon each of the principal points distinctive of the Kentish tenure of gavelkind—freedom from escheats on attainder and execution for felony, the power to devise, the age of alienation, and descent to all the sons together—adopting some and modifying others. Body of Liberties, arts. 10, 11, 53, 81; 2 Bl. Comm. 84.

In the laws of Europe, at the time of the foundation of the colony, descent was named first among the sources of slavery. The common law, following the civil law, repeated "*Servi aut nascuntur aut fiunt*," and differed only in tracing it through the father, instead of the mother; and each system recognized that a man might become a slave by capture in war, or by his own consent or confession in some form. Just. Inst. lib. 1, tit. 3; Bract. 4b; Fleta, lib. 1, c. 3; *Eedes v. Holbadge*, Act. Can. 393; Swinb. Wills, pt. 2, § 7; Co. Litt. 117b. And such was then the established law of nations. Gro. *De Jure B.* lib. 2, c. 5, §§ 27, 29; Id.

lib. 3, c. 7. In parts of England, hereditary villenage would seem to have still existed in fact; and it was allowed by law until since the American Revolution. *Pigg v. Caley*, Noy, 27; Co. Litt. 116-140: 2 Inst. 28, 45; 2 Rolle, Abr. 732; *Smith v. Brown*, 2 Salk. 666, Holt, 495; *Smith v. Gould*, 2 Salk. 667, 2 Ld. Raym. 1275; *Treblecock's Case*, 1 Atk. 633; *The King v. Ditton*, 4 Doug. 302. Lord Bacon, in explaining the maxim, "*Jura sanguinis nulla jure civili dirimi possunt*," with a coolness which shows that in his day and country the illustration was neither unfamiliar nor shocking, says, "If a villein be attainted, yet the lord shall have the issue of his villein born before or after his attainer; for the lord hath them *jure naturæ* but as the increase of a flock." Bac. Max. reg. 11.

The Massachusetts Body of Liberties, as Governor Winthrop tells us, was composed by Nathaniel Ward, who had been "formerly a student and practiser in the course of the common law." 2 Winthrop's Hist. New England, 55. In view of the other laws of the time, the omission, in enumerating the legal sources of slavery, of birth, the first mentioned in those laws, is significant. No instance is known in which the lawfulness of hereditary slavery in Massachusetts under the charter of the colony or the province was affirmed by legislative or judicial authority; and it has been denied in a series of judgments of this court, beginning in the last century, in each of which it was essential to the determination of the rights of the parties. *Littleton v. Tuttle*, 4 Mass. 128, note; *Lanesborough v. Westfield*, 16 Mass. 74; *Edgartown v. Tisbury*, 10 Cush. 408. The case of *Perkins v. Emerson*, 2 Dane, Abr. 412, did not touch this question; but simply determined that a person received into a house as a slave of the owner was not received "as an inmate, boarder or tenant," so that notice of the place whence such person last came must be given to the selectmen under Prov. St. 10 Geo. II.; Anc. Chart. 508. No doubt many children of slaves were in fact held as slaves here, especially after the Province Charter, during the period of which all acts of the general court were required to be transmitted to England for approval. Earlier ordinances which had not been so approved were hardly recognized by the English government as of any force. The policy of England restrained the colonists from abolishing the African slave trade, and the number of slaves (which had been very small under the comparatively independent government of the colony) was much increased. The practice of a whole people does not always conform to its laws. Thousands of negroes were held as slaves in England and commonly sold in public at the very time when Lord Mansfield and other judges decided such holding to be unlawful. *Sommersett's Case*, 20 Howell, St. Tr. 72, 79; Lofft, 17; Quincy, 97, note; *The Slave Grace*, 2 Hagg. Adm. 105, 106.

While negro slavery existed in Massachusetts, it was in a comparatively mild form. The marriages of slaves were protected by the legislature and the courts; according to the opinion of Hutchinson and of

Dane, slaves might hold property; they were admitted as witnesses, even on capital trials of white persons, and on suits of other slaves for freedom; they might sue their masters for wounding or immoderately beating them; and indeed hardly differed from apprentices or other servants except in being bound for life. See authorities and records cited in Quincy, 30, 31, note; 2 Dane, Abr. 313. The annual tax acts show that before the Declaration of Independence they were usually taxed as property, always afterwards as persons. The general court in September, 1776, forbade the sale of two negroes taken as prize of war on the high seas and brought into this state, and resolved that any negroes so taken and brought in should not be allowed to be sold, but should be treated like other prisoners. Res. Sept. 1776, c. 83.

It was in Massachusetts, by the first article of the declaration of rights prefixed to the constitution adopted in 1780, as immediately afterwards interpreted by this court, that the fundamental axioms of the Declaration of Independence—"that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness"—first took at once the form and the force of express law; slavery was thus wholly abolished in Massachusetts; and it has never existed here since, except so far as the constitution and laws of the state were held to be prevented by the constitution and laws of the United States from operating upon fugitive slaves. *Caldwell v. Jennison*, Rec. 1781, fol. 79, 80; *Jennison's Petition*, Jour. H. R. June 18, 1782, fol. 89; *Com. v. Jennison*, Rec. 1783, fol. 85; *Parsons, C. J., in Winchendon v. Hatfield*, 4 Mass. 128; 4 Mass. Hist. Coll. 203, 204; *Com. v. Aves*, 18 Pick. 208, 210, 215, 217; 2 Kent, Comm. (6th Ed.) 252; *Betty v. Horton*, 5 Leigh (Va.) 623.

The doctrine of our law, upon this subject, as stated by Chief Justice Shaw in delivering the judgment of the court in *Com. v. Aves*, just cited, is that slavery is a relation founded in force, contrary to natural right and the principles of justice, humanity and sound policy; and could exist only by the effect of positive law, as manifested either by direct legislation or settled usage. The same principle has been recognized by Chief Justice Marshall and Mr. Justice Story, speaking for the supreme court of the United States. *The Antelope*, 10 Wheat. 120, 121, 6 L. Ed. 268; *Prigg v. Pennsylvania*, 16 Pet. 611, 10 L. Ed. 1060.

The constitution of the United States uniformly speaks of those held in slavery, not as property, but as persons; and never contained anything inconsistent with their peaceable and voluntary emancipation. As between master and slave, it would require the most explicit prohibition by law to restrain the right of manumission. *M'Cutchen v. Marshall*, 8 Pet. 238, 8 L. Ed. 923. We cannot take judicial notice of the local laws of other states of the Union except so far as they are in proof. *Knapp v. Abell*, 10 Allen, 488. But it appears by cases cited at the bar that bequests of manumission were formerly favored in Virginia; and that it was more recently decided in Mississippi that a trust created by

will for paying the expenses of transporting the testator's slaves to Africa and maintaining them in freedom there was lawful. *Charles v. Hunnicutt*, 5 Call (Va.) 311; *Wade v. American Colonization Soc.*, 7 Smedes & M. (Miss.) 663, 45 Am. Dec. 324. A state of slavery, in which manumission was wholly prohibited, has never been known among civilized nations. Even when slavery prevailed throughout the world, the same common law of nations, *jus gentium*, which justified its existence, recognized the right of manumission as a necessary consequence. Just. Inst. lib. 1, tit. 5.

We fully concur with the learned counsel for the heirs at law that if this trust could not be executed according to the intention of the testator without tending to excite servile insurrections in other states of the Union, it would have been unlawful; and that a trust which looked solely to political agitation and to attempts to alter existing laws could not be recognized by this court as charitable. But such does not appear to us to be the necessary or the reasonable interpretation of this bequest. The manner stated of putting an end to slavery is not by legislation or political action, but by creating a public sentiment, which rather points to moral influence and voluntary manumission. The means specified are the usual means of public instruction, by books and newspapers, speeches and lectures. Other means are left to the discretion of the trustees, but there is nothing to indicate that they are not designed to be of a kindred nature. Giving to the bequest that favorable construction to which all charitable gifts are entitled the just inference is that lawful means only are to be selected, and that they are to be used in a lawful manner.

It was further objected that "to create a public sentiment" was too vague and indefinite an object to be sustained as a charitable use. But "a public sentiment" on a moral question is but another name for public opinion, or a harmony of thought—*idem sentire*. The only case cited for the heirs at law in support of this objection was *Browne v. Yeall*, 7 Ves. 50, note, in which Lord Thurlow held void a perpetual trust for the purchase and distribution in Great Britain and its dominions of such books as might have a tendency to promote the interests of virtue and religion and the happiness of mankind. But the correctness of that decision was doubted by Sir William Grant and Lord Eldon in *Morice v. Bishop of Durham*, 9 Ves. 406, 10 Ves. 534, 539; and it is inconsistent with the more recent authorities, here and in England. The bequest now before us is quite as definite as one "for the increase and improvement of Christian knowledge and promoting religion," and the purchase from time to time of such bibles and other religious books, pamphlets and tracts as the trustees should think fit for that purpose, which was upheld by Lord Eldon in *Attorney General v. Stepney*, 10 Ves. 22; or "to the cause of Christ, for the benefit and promotion of true evangelical piety and religion," through the agency of trustees, to be by them "appropriated to the cause of religion as above stated to be distributed in such divisions and to such societies and religious charita-

ble purposes as they may think fit and proper," which was sustained by this court in *Going v. Emery*, 16 Pick. 107, 26 Am. Dec. 645; or "for the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors composing the Middlesex Union Association," as in *Brown v. Kelsey*, 2 Cush. 243; or to be distributed, at the discretion of trustees, "in aid of objects and purposes of benevolence or charity, public or private," as in *Saltonstall v. Sanders*, 11 Allen, 446; or "for the cause of peace," to be expended by an unincorporated society, whose object, as defined in its constitution, was "to illustrate the inconsistency of war with Christianity, to show its baleful influence on all the great interests of mankind, and to devise means for insuring universal and permanent peace," as in *Tappan v. Deblois*, 45 Me. 122; or to found "an establishment for the increase and diffusion of knowledge among men;" or "for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit;" as in *Whicker v. Hume*, 7 H. L. Cas. 124, 155, and *President of U. S. v. Drummond*, there cited. See, also, *McDonogh v. Murdoch*, 15 How. 405, 414, 14 L. Ed. 732.

The bequest itself manifests its immediate purpose to be to educate the whole people upon the sin of a man's holding his fellowman in bondage; and its ultimate object, to put an end to negro slavery in the United States; in either aspect, a lawful charity.

It is universally admitted that trusts for the promotion of religion and education are charities. Gifts for the instruction of the public in the cure of the diseases of quadrupeds or birds useful to man, or for the prevention of cruelty to animals (either by publishing newspapers on the subject, or by providing establishments where killing them for the market might be attended with as little suffering as possible), have been held charitable in England. *London University v. Yarrow*, 23 Beav. 159, 1 De Gex & J. 72; *Marsh v. Means*, 3 Jur. (N. S.) 790; *Tatham v. Drummond*, 11 L. T. (N. S.) 325. To deliver men from a bondage which the law regards as contrary to natural right, humanity, justice and sound policy, is surely not less charitable than to lessen the sufferings of animals. The constitution of Massachusetts, which declares that all men are born free and equal, and have the natural, essential and unalienable rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, of seeking and obtaining their safety and happiness; also declares that a frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety and justice, are absolutely necessary to preserve the advantages of liberty and to maintain a free government; that "the encouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America;" and that "wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the

preservation of their rights and liberties, and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth," besides cherishing the interests of literature and the sciences, "to countenance and inculcate the principles of humanity and general benevolence, public and private charity," "and all social affections and generous sentiments among the people." Declaration of Rights, arts. 1, 18; Const. Mass. c. 5. This bequest directly tends to carry out the principles thus declared in the fundamental law of the commonwealth. And certainly no kind of education could better accord with the religion of Him who came to preach deliverance to the captives, and taught that you should love your neighbor as yourself and do unto others as you would that they should do unto you.

The authorities already cited show that the peaceable redemption or manumission of slaves in any manner not prohibited by law is a charitable object. It falls indeed within the spirit, and almost within the letter, of many clauses in the statute of Elizabeth. It would be an anomaly in a system of law, which recognized as charitable uses the relief of the poor, the education and preferment of orphans, marriages of poor maids, the assistance of young tradesmen, handicraftsmen and persons decayed, the relief of prisoners and the redemption of captives, to exclude the deliverance of an indefinite number of human beings from a condition in which they were so poor as not even to own themselves, in which their children could not be educated, in which marriages had no sanction of law or security of duration, in which all their earnings belonged to another, and they were subject, against the law of nature, and without any crime of their own, to such an arbitrary dominion as the modern usages of nations will not countenance over captives taken from the most barbarous enemy.

III. The next question arises upon the bequest in trust for the benefit of fugitive slaves who might from time to time escape from the slaveholding states of the Union.

The validity of this bequest must be determined according to the law as it stood at the time when the testator died and from which his will took effect. It is no part of the duty of this court to maintain the constitutionality, the justice, or the policy of the fugitive slave acts, now happily repealed. But the constitution of the United States, at the time of the testator's death, declared that no person held to service or labor in one state should be discharged therefrom by escaping into another. It may safely be assumed that, under such a constitution, a bequest to assist fugitive slaves to escape from those to whom their service was thus recognized to be due could not have been upheld and enforced as a lawful charity. The epithets with which the testator accompanied this bequest show that he set his own ideas of moral duty above his allegiance to his state or his country; and warrant the conjecture that he would have been well pleased to have the fund applied

in a manner inconsistent with the constitution and laws of the United States. But he has used no words to limit its use to illegal methods, and has left his trustees untrammelled as to the mode of its application.

Whether this bequest is or is not valid, is to be ascertained from a fair construction of its language, in the light of the maxims of interpretation stated in the earlier part of this opinion, by which the court is bound to carry into effect any charitable bequest in which can be seen a general intention consistent with the law, even if the particular mode pointed out is illegal; and there is no authority to construe it to be void if it can be applied in a lawful manner consistently with the intention of the testator as manifested in the words by which it is expressed. One illustration of these maxims may be added in this connection.

In *Issac v. Gompertz, Amb. (2d Ed.) 228*, note, the will contained one bequest for the support and maintenance of a Jews' synagogue; and another bequest of an annuity "to the gabas of the said synagogue," who were found, upon inquiry by a master, to be treasurers of the synagogue, whose office it was to collect and receive the annual subscriptions for the support of poor Jews belonging to the synagogue, and to apply the same to the expenses of supporting the synagogue and to the maintenance of such poor Jews. This last bequest was upheld, and referred to a master to report a scheme, although the support of the synagogue was adjudged to be an unlawful use; and thus a bequest manifestly intended for the benefit of persons professing a religion not tolerated by law, and which might, according to its terms, be applied either in an unlawful or a lawful manner, was sustained as charitable, and its application confined to the lawful mode.

A bequest for the benefit of fugitive slaves is not necessarily unlawful. The words "relief or redemption of prisoners and captives" have always been held in England to include those in prison under condemnation for crime, as well as persons confined for debt; and to support gifts for distributing bread and meat among them annually, or for enabling poor imprisoned debtors to compound with their creditors. *Duke, Char. Uses, 131, 156; Attorney General v. Ironmongers' Co., Coop. Prac. Cas. 285, 290; Attorney General v. Painterstainers' Co., 2 Cox. Ch. 51; Attorney General v. Drapers' Co., Tudor, Char. Trusts. 591, 592, 4 Beav. 67; 36th Report of Charity Commissioners to Parliament, pt. 6, pp. 856-868.* It would be hardly consistent with charity or justice to favor the relief of those undergoing punishment for crimes of their own committing, or imprisonment for not paying debts of their own contracting; and yet prohibit a like relief to those who were in equal need, because they had withdrawn themselves from a service imposed upon them by local laws without their fault or consent.

It was indeed held in *Thrupp v. Collett, 26 Beav. 125*, that a bequest to be applied to purchasing and procuring the discharge of persons committed to prison for non-payment of fines under the game laws was not a lawful charity. But such persons were convicted offenders against the law of England, who would by such discharge be wholly re-

leased from punishment. A fugitive slave was not a criminal by the laws of this commonwealth or of the United States.

To supply sick or destitute fugitive slaves with food and clothing, medicine or shelter, or to extinguish by purchase the claims of those asserting a right to their service and labor would in no wise have tended to impair the claim of the latter or the operation of the constitution and laws of the United States; and would clearly have been within the terms of this bequest. If, for example, the trustees named in the will had received this fund from the executor without question, and had seen fit to apply it for the benefit of fugitive slaves in such a manner, they could not have been held liable as for a breach of trust.

This bequest therefore, as well as the previous one, being capable of being applied according to its terms in a lawful manner at the time of the testator's death, must, upon the settled principles of construction, be held a valid charity.

It is hardly necessary to remark that the direction of the testator that his trustees shall not be accountable to any one is simply void. No testator can obtain for his bequests that support and permanence which the law gives to public charities only, and at the same time deprive the beneficiaries and the public of the safeguards which the law provides for their due and lawful administration.

As the trustees named in the will are not a corporation established by law, and these two bequests are unlimited in duration, and by their terms might cover an illegal as well as a legal appropriation, it is the duty of the court, before ordering the funds to be paid to the trustees, to refer the case to a master to settle a scheme for their application in a lawful manner. *Isaac v. Gompertz*, Amb. 228, note; *Attorney General v. Stepney*, 10 Ves. 22; *Boyle*, Char. 100, 217.

IV. It is quite clear that the bequest in trust to be expended "to secure the passage of laws granting women, whether married or unmarried, the right to vote, to hold office, to hold, manage and devise property, and all other civil rights enjoyed by men," cannot be sustained as a charity.

No precedent has been cited in its support. This bequest differs from the others in aiming directly and exclusively to change the laws; and its object cannot be accomplished without changing the constitution also. Whether such an alteration of the existing laws and frame of government would be wise and desirable is a question upon which we cannot, sitting in a judicial capacity, properly express any opinion. Our duty is limited to expounding the laws as they stand. And those laws do not recognize the purpose of overthrowing or changing them, in whole or in part, as a charitable use. This bequest therefore, not being for a charitable purpose nor for the benefit of any particular persons, and being unrestricted in point of time, is inoperative and void.

For the same reason, the gift to the same object of one third of the residue of the testator's estate after the death of his daughter Mrs. Ed-

dy and her daughter Mrs. Bacon, is also invalid, and will go to his heirs at law as a resulting trust.

It is proper to add that the conclusion of the court upon this point, as well as upon the gift to create a public sentiment which would put an end to negro slavery in the United States, had the concurrence of the late Mr. Justice Dewey, whose judicial experience and large acquaintance with the law of charitable uses give great weight to his opinion, and whose lamented death, while this case has been under advisement, has deprived us of his assistance in determining the other questions in controversy.

V. The validity of the other residuary bequests and devises depends upon the law of perpetuities as applied to private trusts. The principles of this branch of the law have been so fully considered by the court in recent cases as to require no extended statement.

The general rule is that if any estate, legal or equitable, is given by deed or will to any person in the first instance, and then over to another person, or even to a public charity, upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating a child in its mother's womb as in being) and twenty-one years afterwards, the gift over is void, as tending to create a perpetuity by making the estate inalienable; for the title of those taking the previous interests would not be perfect, and until the happening of the contingency it could not be ascertained who were entitled. *Brattle Square Church v. Grant*, 3 Gray, 142, 63 Am. Dec. 725; *Odell v. Odell*, 10 Allen, 5, 7. If therefore the gift over is limited upon a single event which may or may not happen within the prescribed period, it is void, and cannot be made good by the actual happening of the event within that period.

But if the testator distinctly makes his gift over to depend upon what is sometimes called an alternative contingency, or upon either of two contingencies, one of which may be too remote and the other cannot be, its validity depends upon the event; or, in other words, if he gives the estate over on one contingency which must happen, if at all, within the limit of the rule, and that contingency does happen, the validity of the distinct gift over in that event will not be affected by the consideration that upon a different contingency, which might or might not happen within the lawful limit, he makes a disposition of his estate, which would be void for remoteness. The authorities upon this point are conclusive. *Longhead v. Phelps*, 2 W. Bl. 704; *Sugden and Preston, arguendo, in Beard v. Westcott*, 5 Barn. & Ald. 809, 813, 814; *Minter v. Wraith*, 13 Sim. 52; *Evers v. Challis*, 7 H. L. Cas. 531; *Armstrong v. Armstrong*, 14 B. Mon. (Ky.) 333; 1 Jarm. Wills, 244; *Lewis, Perp. c. 21*; 2 Spence, Eq. Jur. 125, 126.

By the ninth and tenth articles of the will, the income of one third of the residue of the testator's estate, real and personal, is to be paid to his son James and to his daughter Mrs. Palmer, respectively,

during life. Each of these articles contains a distinct direction that, in case such son or daughter shall die leaving no child surviving, the principal of his or her share shall be paid and conveyed to the board of trustees named in the fourth article, to be expended for the intent and purpose therein directed. As the first tenant for life in each bequest is living at the death of the testator, the event of such tenant's dying, leaving no child then living, must happen within the period of a life in being, if at all; and, if it does happen, the gift over to the charity will be valid. Neither James Jackson nor Mrs. Palmer therefore is entitled to a present equitable estate in fee. But as James, though now unmarried, may marry and have children who survive him, and as Mrs. Palmer's children may survive her, in either of which cases half of the income of the share would by the will go to such children during their lives and the bequest over to the charity be too remote, the validity and effect of that bequest over cannot be now determined. If the contingency upon which it is valid should hereafter occur, namely, the death of the testator's son or daughter, respectively, leaving no children surviving, the whole remainder of the share will then go to the charity established by the fourth article, and be paid, after the settlement of a scheme for its lawful application, to the trustees therein named.

VI. By the thirteenth amendment of the constitution of the United States, adopted since the earlier arguments of this case, it is declared that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." The effect of this amendment upon the charitable bequests of Francis Jackson is the remaining question to be determined; and this requires a consideration of the nature and proper limits of the doctrine of *cy pres*.

It is contended for the heirs at law, that the power of the English chancellor, when a charitable trust cannot be administered according to its terms, to execute it so as to carry out the donor's intention as nearly as possible—*cy pres*—is derived from the royal prerogative or St. 43 Eliz. and is not an exercise of judicial authority; that, whether this power is prerogative or judicial, it cannot, or, if it can, should not, be exercised by this court; and that the doctrine of *cy pres*, even as administered in the English chancery, would not sustain these charitable bequests since slavery has been abolished.

Much confusion of ideas has arisen from the use of the term "*cy pres*" in the books to describe two distinct powers exercised by the English chancellor in charity cases, the one under the sign manual of the crown, the other under the general jurisdiction in equity; as well as to designate the rule of construction which has sometimes been applied to executory devises or powers of appointment to individuals,

in order to avoid the objection of remoteness. It was of this last, and not of any doctrine peculiar to charities, that Lord Kenyon said, "The doctrine of cy pres goes to the utmost verge of the law, and we must take care that it does not run wild;" and Lord Eldon, "It is not proper to go one step farther." *Brudenell v. Elwes*, 1 East, 451, 7 Ves. 390; 1 Jarm. Wills, 261-263; Sugd. Powers, c. 9, § 9; *Coster v. Lorillard*, 14 Wend. (N. Y.) 309, 348.

The principal, if not the only, cases in which the disposition of a charity is held to be in the crown by sign manual, are of two classes; the first, of bequests to particular uses charitable in their nature, but illegal, as for a form of religion not tolerated by law; and the second, of gifts of property to charity generally, without any trust interposed, and in which either no appointment is provided for, or the power of appointment is delegated to persons who die without exercising it.

It is by the sign manual and in cases of the first class, that the arbitrary dispositions have been made, which were so justly condemned by Lord Thurlow in *Moggridge v. Thackwell*, 1 Ves. Jr. 469, and Sir William Grant in *Cary v. Abbot*, 7 Ves. 494, 495; and which, through want of due discrimination, have brought so much discredit upon the whole doctrine of cy pres. Such was the case of Attorney General *v. Baxter*, in which a bequest to Mr. Baxter to be distributed by him among sixty pious ejected ministers, (not, as the testator declared, for the sake of their nonconformity, but because he knew many of them to be pious and good men and in great want,) was held to be void, and given under the sign manual to Chelsea College; but the decree was afterwards reversed, upon the ground that this was really a legacy to sixty individuals to be named. 1 Vern. 248; 2 Vern. 105; 1 Eq. Cas. Abr. 96; 7 Ves. 76. Such also was the case of *Da Costa v. De Pas*, in which a gift for establishing a *jesuba* or assembly for reading the Jewish law was applied to the support of a Christian chapel at a foundling hospital. Amb. 228; 2 Swanst. 489, note; 1 Dickens, 258; 7 Ves. 76, 81.

This power of disposal by the sign manual of the crown in direct opposition to the declared intention of the testator, whether it is to be deemed to have belonged to the king as head of the church as well as of the state, "intrusted and empowered to see that nothing be done to the disherison of the crown or the propagation of a false religion" (*Rex v. Portington*, 1 Salk. 162, 1 Eq. Cas. Abr. 96); or to have been derived from the power exercised by the Roman emperor, who was sovereign legislator as well as supreme interpreter of the laws (Dig. 33, 2, 17; 50, 8, 4; Code, lib. 1, tit. 2, c. 19; Id., tit. 14, c. 12); is clearly a prerogative and not a judicial power, and could not be exercised by this court; and it is difficult to see how it could be held to exist at all in a republic, in which charitable bequests have never been forfeited to the use or submitted to the disposition of the govern-

ment, because superstitious or illegal. 4 Dane, Abr. 239; *Gass v. Wilhite*, 2 Dana (Ky.) 176, 26 Am. Dec. 446; *Methodist Church v. Remington*, 1 Watts (Pa.) 226, 26 Am. Dec. 61.

The second class of bequests which are disposed of by the king's sign manual is of gifts to charity generally, with no uses specified, no trust interposed, and either no provision made for an appointment, or the power of appointment delegated to particular persons who die without exercising it. *Boyle*, Char. 238, 239; *Attorney General v. Syderfen*, 1 Vern. 224, 1 Eq. Cas. Abr. 96; *Attorney General v. Fletcher*, 5 Law J. Ch. (N. S.) 75. This too is not a judicial power of expounding and carrying out the testator's intention, but a prerogative power of ordaining what the testator has failed to express. No instance is reported, or has been discovered in the thorough investigations of the subject, of an exercise of this power in England before the reign of Charles II. *Moggridge v. Thackwell*, 7 Ves. 69-81; *Dwight's Argument in the Rose Will Case*, 272. It has never, so far as we know, been introduced into the practice of any court in this country; and, if it exists anywhere here, it is in the legislature of the commonwealth as succeeding to the powers of the king as *parens patriæ*. 4 Kent, Comm. 508, note; *Fontain v. Ravenel*, 17 How. 369, 384, 15 L. Ed. 80; *Moore v. Moore*, 4 Dana (Ky.) 365, 366, 29 Am. Dec. 417; *Witman v. Lex*, 17 Serg. & R. (Pa.) 93, 17 Am. Dec. 644; *Attorney General v. Jolly*, 1 Rich. Eq. (S. C.) 108, 42 Am. Dec. 349; *Dickson v. Montgomery*, 1 Swan (Tenn.) 348; *Lepage v. Macnamara*, 5 Iowa, 146; *Bartlet v. King*, 12 Mass. 545, 7 Am. Dec. 99; *Sohier v. Massachusetts General Hospital*, 3 Cush. 496, 497. It certainly cannot be exercised by the judiciary of a state whose constitution declares that "the judicial department shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men." Declaration of Rights, art. 30.

The jurisdiction of the court of chancery to superintend the administration and decree the performance of gifts to trustees for charitable uses of a kind stated in the gift stands upon different grounds; and is part of its equity jurisdiction over trusts, which is shown by abundant evidence to have existed before the passage of the statute of charitable uses. Sir Francis Moore records a case in which a man sold land to another upon confidence to perform a charitable use, which the grantor declared by his last will that the grantee should perform; "the bargain was never enrolled, and yet the lord chancellor decreed that the heir should sell the land to be disposed according to the limitation of the use; and this decree was made the 24th of Queen Elizabeth, before the statute of charitable uses, and this decree was made upon ordinary and judicial equity in chancery." *Symon's Case*, Duke, Char. Uses, 163. About the same time the court of chancery entertained a suit between two parties, each claiming to be trustee, to determine how bequests for the weekly relief of the poor of certain towns,

for the yearly preferment of poor children to be apprentices, and for the curing of divers diseased people lying by the highway's side, should be "employed and bestowed according to the said will." *Reade v. Silles* (27 Eliz.) Act. Can. 559. A decree in 16 Eliz., confirming a report of the master of the rolls and others to whom a suit for enforcing a charitable trust founded by will had been referred, is cited in 1 Spence, Eq. Jur. 588, note. For years before St. 43 Eliz., or the similar act of 39 Eliz., suits in equity by some in behalf of all of the inhabitants of a parish were maintained to establish and enforce bequests for schools, alms, or other charitable purposes for the benefit of the parish, which would have been too indefinite to be enforced as private trusts. *Parker v. Browne* (12 Eliz.) 1 Cal. Pro. Ch. 81, 1 Mylne & K. 389, 390; *Dwight, Char. Cas.* 33, 34, in which the devise was in trust to a corporation incapable at law of taking. *Parrot v. Pawlet* (21 Eliz.) Cary, 47; *Elmer v. Scot* (24 Eliz.) Cho. Cas. Ch. 155; *Matthew v. Marow* (32-34 Eliz.); and *Hensman v. Hackney* (38 Eliz.) *Dwight, Char. Cas.* 65, 77, in which the decrees approved schemes settled by masters in chancery. Many other examples are collected in the able and learned arguments, as separately printed in full, of Mr. Binney in the Case of Girard's Will, and of Mr. Dwight in the Rose Will Case. And the existence of such a jurisdiction anterior to and independent of the statute is now generally admitted. *Vidal v. Girard*, 2 How. 194-196, 11 L. Ed. 205, and cases cited; *Perin v. Carey*, 24 How. 501, 16 L. Ed. 701; *Magill v. Brown*, *Brightly*, N. P. 346; 2 Kent, Comm. 286-288, and note; *Burbank v. Whitney*, 24 Pick. 152, 153, 35 Am. Dec. 312; *Preachers' Aid Soc. v. Rich*, 45 Me. 559; *Derby v. Derby*, 4 R. I. 436; *Landis v. Wooden*, 1 Ohio St. 160, 59 Am. Dec. 615; *Chambers v. St. Louis*, 29 Mo. 543; 1 Spence, Eq. Jur. 588; *Tudor, Char. Trusts*, 102, 103.

The theory that St. 43 Eliz. enlarged the discretion of the chancellor to depart from the expressed intention of the founder of a charity is refuted by the words of the statute itself. After reciting that many gifts and appointments for the charitable purposes therein named "have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same;" it then, for redress and remedy thereof, authorizes the lord chancellor or lord keeper to make such decrees that the property "may be duly and faithfully employed to and for such of the charitable uses and intents before rehearsed respectively for which they were given, limited, assigned or appointed by the donors and founders thereof;" which decrees, "not being contrary or repugnant to the orders, statutes or decrees of the donors or founders," shall "stand firm and good, according to the tenor and purpose thereof, and shall be executed accordingly," until altered by the lord chancellor or lord keeper upon complaint by any party aggrieved; and upon such complaint the chan-

cellor or keeper may "by such course as to their wisdoms shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing and determining thereof; and upon hearing thereof shall and may annul, diminish, alter or enlarge" the decrees of the commissioners as "shall be thought to stand with equity and good conscience, according to the true intent and meaning of the donors and founders thereof." These last qualifications are specially marked by Lord Coke, who was attorney general at the passage of the statute and for some time before and after, and who adds, by way of note to the final clause, "This is the lapis ductitiûs, whereby the commissioners and chancellors must institute their course." 2 Inst. 712. See, also, Duke, Char. Uses, 11, 156, 169, 372, 619.

In cases of bequests to trustees for charitable uses, the nature of which is described in the will, the chancellor acts in his equity jurisdiction over trusts; and the prerogative of the king finds its appropriate exercise through his attorney general in bringing the case before the court of chancery for a judicial determination. This has been well explained by Lord Eldon. "It is the duty of a court of equity, a main part, originally almost the whole, of its jurisdiction, to administer trusts; to protect not the visible owner, who alone can proceed at law, but the individual equitably, though not legally, entitled. From this principle has arisen the practice of administering the trust of a public charity; persons possessed of funds appropriated to such purposes are within the general rule; but, no one being entitled to an immediate and peculiar interest to prefer a complaint, who is to compel the performance of these obligations, and to enforce their responsibility? It is the duty of the king, as *parens patriæ*, to protect property devoted to charitable uses; and that duty is executed by the officer who represents the crown for all forensic purposes. On this foundation rests the right of the attorney general in such cases to obtain by information the interposition of a court of equity." *Attorney General v. Brown*, 1 Swanst. 291, 1 Wils. 354. To the like effect are the opinions of Lord Redesdale in *Attorney General v. Mayor*, etc., of Dublin, 1 Bligh (N. S.) 347, 348, and *Corporation of Ludlow v. Greenhouse*, Id. 48, 62; of Lord Keeper Bridgman in *Attorney General v. Newman*, 1 Ch. Cas. 158; of Sir Joseph Jekyll in *Eyre v. Shaftsbury*, 2 P. Wms. 119; and of Lord Hardwicke in *Attorney General v. Middleton*, 2 Ves. Sr. 328,—which also state that the jurisdiction of the court of chancery over charities was exercised on such informations before St. 43 Eliz. See, also, *Attorney General v. Carroll*, Act. Can. 729; *Dwight's Argument in the Rose Will Case*, 259–268. This duty of maintaining the rights of the public, and of a number of persons too indefinite to vindicate their own, has vested in the commonwealth, and is exercised here, as in England, through the attorney general. *Going v. Emery*, 16 Pick. 119, 26 Am. Dec. 645; *County Attorney v. May*, 5 Cush. 338–340; Gen. St. c. 14, § 20. It

is upon this ground that, in a suit instituted by the trustees of a charity to obtain the instructions of the court, the attorney general should be made a party defendant, as he has been by order of the court in this case. *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 280; *Tudor, Char. Trusts*, 161, 162. The power of the king or commonwealth, thus exercised, is simply to present the question to a court of justice, not to control or direct its judicial action.

A charity, being a trust in the support and execution of which the whole public is concerned, and which is therefore allowed by the law to be perpetual, deserves and often requires the exercise of a larger discretion by the court of chancery than a mere private trust; for without a large discretionary power, in carrying out the general intent of the donor, to vary the details of administration, and even the mode of application, many charities would fail by change of circumstances and the happening of contingencies which no human foresight could provide against; and the probabilities of such failure would increase with the lapse of time and the remoteness of the heirs from the original donor who had in a clear and lawful manner manifested his will to divert his estate from his heirs for the benefit of public charities.

It is accordingly well settled by decisions of the highest authority, that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible, to carry out his general charitable intent. In all the cases of charities which have been administered in the English courts of chancery without the aid of the sign manual, the prerogative of the king acting through the chancellor has not been alluded to, except for the purpose of distinguishing it from the power exercised by the court in its inherent equitable jurisdiction with the assistance of its masters in chancery.

At the time of the settlement of the Massachusetts Colony, this power was most freely exercised by the court of chancery, either on information by the attorney general, or on proceedings by commission under the statute of charitable uses. *Attorney General v. Warwick* (1615, 1638) *Dwight, Char. Cas.* 140, 141, *West, Ch.* 60, 62; *Bloomfield v. Stowemarket* (1619) *Duke, Char. Uses*, 644. In the last case, lands had been given before the Reformation to be sold, and the proceeds applied, one half to the making of a highway from the town in which the lands were, one fourth to the repair of a church in that town, and the other fourth to the priest of the church to say prayers for the souls of the donor and others; and Lord Bacon decreed the establishment of

the uses for making the highway and repairing the church, and directed the remaining fourth (which could not, by reason of the change in religion, be applied as directed by the donor) to be divided between the poor of the same town, and the poor of the town where the donor inhabited.

In the Case of Baliol College, this doctrine was enforced by successive decrees of the greatest English chancellors between the English Revolution and our own, which have been recently confirmed by the unanimous decision of the house of lords. *Attorney General v. Guise*, 2 Vern. 166; *Attorney General v. Baliol College*, 9 Mod. 407; *Attorney General v. Glasgow College*, 2 Colly. 665, 1 H. L. Cas. 800. The case is of such importance and reported at different stages in so many books and at such length, that it may be well to state it. John Snell, an Episcopalian, who made his last will and died in 1679, while the form of religion established by law in Scotland as well as in England was Episcopal, gave lands in trust to apply the income for the maintenance and education at the university of Oxford of Scotchmen to be designated by the vice chancellor of that university and the heads of certain colleges therein, and who should, upon their admission, give security to enter into holy orders and to be sent into Scotland and there remain. After the Revolution of 1688, Presbyterianism was reestablished in Scotland by act of parliament; and in 1690 an information was filed by the attorney general, at the relation of the vice chancellor and heads of colleges named in the will, against the testator's heiress at law, suggesting a pretence by her that as Episcopacy and Prelacy had been abolished in Scotland, and the Presbyterian form of worship established instead, the testator's intentions could not be carried into effect, the devise became void, and the property reverted to her. But the lords commissioners of the great seal, by a decree passed in 1692, established the devise against her, ordered an account, and reserved all directions for the establishment of the charity. 2 Vern. 267, note; 2 Colly. 665-670, 1 H. L. Cas. 802-804, 820, 822. In 1693 the cause came on for further directions before Lord Keeper Somers, who, acting upon the doctrine that it was within the province of a court of equity to administer the trust upon the principle of *cy pres*, ordered the estate to be conveyed to the six senior fellows of Baliol College, one of the colleges named in the will, to maintain a certain number of Scotch scholars at that college, and, in consideration of the privileges enjoyed by such scholars, to apply the surplus income to its library; and this decree was made subject to such alteration and disposition as the court should from time to time make, upon the application of any person concerned, for the better and more effectual execution of the trust, as near as could be to the testator's will and intentions. 2 Vern. 267, note; 2 Colly. 670, 671, 1 H. L. Cas. 804, 805, 824. In 1744 Lord Hardwicke, in the execution of the directions in the decree of Lord Somers, referred the cause to a master to approve of a scheme "for the better establishment and regulation of the charity, and carrying the same into effect for the future as

near to the will and intention of the testator as the alteration of circumstances since the making of the will would admit;" and upon his report, and against the exceptions of the heads of colleges in Oxford, confirmed a scheme which did not impose any condition of the scholars taking holy orders—thus carrying out the general intention of the trust so far as to educate Scotch scholars at Oxford, although the testator's ultimate object that they should be educated in the Episcopal form of church government to take part in the established religion in Scotland could not, by reason of the change of law since his death, be effected. 9 Mod. 407; 1 H. L. Cas. 805, 806, 825–827. In 1759 Lord Keeper Henley (afterward Lord Northington) varied the scheme in other particulars, but declined to vary it in this; and further orders were afterwards made in chancery as the revenues increased. 2 Colly. 672–674, 1 H. L. Cas. 806, 807, 825, 826; 3 Ves. 650, note. Upon a new information filed at the relation of some Scotch Episcopalians, the house of lords in 1848, reversing an order of Vice Chancellor Knight Bruce, held that the charity must continue to be administered according to the earlier decrees. 1 H. L. Cas. 800.

In another case, Queen Elizabeth, by letters patent, established a hospital for forty lepers, and made the inmates a corporation. After leprosy had become almost extinct in England, and the members of the corporation reduced to three, an information was filed, alleging that the corporation was dissolved, and praying for a new application of the revenues agreeably to the letters patent and the donor's intention, or as near thereto as circumstances would permit and the court should direct. Lord Eldon held that neither the donor's heirs at law nor the crown took the land discharged of the charity; referred the case to a master to report a scheme; and confirmed the report of the master, approving a scheme for the application of the revenues to a general infirmary, reserving a preference to all lepers who might offer themselves. *Attorney General v. Hicks*, Highm. Mortm. 336–354, 3 Brown, Ch. 166, note.

Sir John Romilly, M. R., afterwards made a like decision, holding that a gift made in 1687 of land (for which in 1774 other land had been substituted by leave of parliament) in trust out of the income to keep it ready for a hospital and burial place for patients sick of the plague, was a present gift for charitable purposes, and valid, although the plague had not reappeared in England for more than one hundred and eighty years; and, after alluding to a class of cases, cited for the heirs at law in that case, as they have been in this, in which the charitable bequest could never have taken effect, added, "But who can say, when this deed was executed or the act passed, that this was not a charitable trust, capable of being performed;" "and if it were ever wholly devoted to charity, those cases do not apply." *Attorney General v. Craven*, 21 Beav. 392, 408.

The principle that a bequest to trustees for charitable purposes indicated in the will, which are lawful and capable of being carried out at

the time of the testator's death, will not be allowed to fail and result to the heirs at law upon a change of circumstances, but will be applied by the court according to a scheme approved by a master to carry out the intent of the testator as nearly as possible, has been affirmed and acted on in many other English cases. *Attorney General v. Pyle*, 1 Atk. 435; *Attorney General v. Green*, 2 Brown, Ch. 492; *Attorney General v. Bishop of London*, 3 Brown, Ch. 171; *Moggridge v. Thackwell*, Id. 517, 1 Ves. Jr. 464; *Attorney General v. Glyn*, 12 Sim. 84; *Attorney General v. Lawes*, 8 Hare, 32; *Attorney General v. Vint*, 3 De Gex & S. 705. The dicta of Lord Alvanley, upon which the heirs at law much rely, do not, in the connection in which they were uttered, substantially differ from the general current of authority. *Attorney General v. Boulton*, 2 Ves. Jr. 387, 388; *Attorney General v. Whitchurch*, 3 Ves. 143, 144; *Attorney General v. Minshull*, 4 Ves. 14.

By the opinion of Lord Eldon, formed after great doubt and hesitation, the principle has been held to extend to the case of a bequest of property to a person named in trust for such charitable purposes, not otherwise described, as he should appoint. *Moggridge v. Thackwell*, 7 Ves. 96, 13 Ves. 416; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Mills v. Farmer*, 19 Ves. 483, 1 Mer. 55. Such a trust has been held valid in this commonwealth, so far as to vest a title in the trustee as against the next of kin. *Wells v. Doane*, 3 Gray, 201. Whether, in case of his death, it could properly be administered by a court of chancery, without the aid of the prerogative power, need not be considered in this case. See *Fontain v. Ravenel*, 17 How. 387, 388, 15 L. Ed. 80; *Moore v. Moore*, 4 Dana (Ky.) 366, 29 Am. Dec. 417.¹⁰

In most of the cases cited at the argument, in which the heirs at law were held to be entitled to the property, the charitable gift never took effect at all; either because it could not be carried out as directed, without violating the mortmain act of 9 Geo. II., as in *Jones v. Williams*, Amb. 651; *Attorney General v. Whitchurch*, 3 Ves. 141, and *Smith v. Oliver*, 11 Beav. 481; or because the testator had in terms limited it to a special object which could not be accomplished at the time of his death; as in the case of a bequest to build a church in Wheatley, which could not be done without the consent of the bishop, and he refused (*Attorney General v. Bishop of Oxford*, 1 Brown, Ch. 444, note; Id., cited 2 Cox, Ch. 365; 2 Ves. Jr. 388; and 4 Ves. 431, 432); or of a direction to contract with the governors of a hospital for the purchase of a presentation of a boy to that charity, if the residuary assets should prove sufficient for that purpose, and they proved to be insufficient (*Cherry v. Mott*, 1 Mylne & C. 123).

In *Marsh v. Means*, 3 Jur. (N. S.) 790, the testator gave a legacy, after the death of his wife, "for continuing the periodical published under the title of 'The Voice of Humanity,' according to the objects and principles which are set forth in the prospectus contained in the

¹⁰ See, also, *Loring v. Marsh*, 6 Wall. 337, 18 L. Ed. 802 (1867).

third number of that publication." "The Voice of Humanity" had been published quarterly by an association for the protection of animals, but no number had appeared for nearly a year before the date of the will. Upon the death of the widow twenty years later, Vice Chancellor Wood held that the gift was not to support the principles of the publication, but only the publication itself, and, the publication having ceased and the association perished, that the legacy lapsed. But he added, "It would, I think, have fallen within the description of charity, if this periodical had been subsisting at the date of the will, and afterwards ceased. That would be simply a case where, the particular intention having failed, the general intention must be carried out."

Two striking cases upon this subject have arisen in England under charities for the redemption of captives.

In the Case of Betton's Charity, Thomas Betton in 1723 bequeathed the residue of his estate to the Ironmongers' Company, in trust, "positively forbidding them to diminish the capital sum by giving away any part, or that the interest and profit arising be applied to any other use or uses than hereinafter mentioned and directed," namely, one half of the income yearly unto the redemption of British slaves in Turkey or Barbary, one fourth unto charity schools in the city and suburbs of London where the education is according to the church of England, and one fourth "unto necessitated decayed freemen of the company, their widows and children." The first half of the income of the fund greatly accumulated, few such slaves having been found for a century. Lord Brougham, reversing the decree of Sir John Leach, M. R., held that the court had jurisdiction to apply the surplus income of this moiety and its accumulations as near as might be to the intentions of the testator; having regard to the bequest touching British captives, and also to the other charitable bequests in the will; and that the case should be referred back to the master to approve a proper scheme for such application. *Attorney General v. Ironmongers' Co.*, 2 Mylne & K. 576. Sir Christopher Pepys, M. R. (afterwards Lord Cottenham,) accordingly ordered it to be so referred. On the return of the master's report, Lord Langdale, M. R., approved a scheme to apply the whole fund to the second and third purposes declared in the will. 2 Beav. 313. Lord Chancellor Cottenham on appeal reversed this decree; and upon the ground that the testator had not limited the first charity, like the others, to persons in London, ordered the first moiety to be applied to supporting and assisting charity schools in England and Wales, and referred it back to the master to settle a scheme for that purpose. *Craig & P.* 208. And this decree was affirmed in the house of lords with the concurrence of Lord Chancellor Lyndhurst, and Lords Brougham, Cottenham and Campbell. 10 Clark & F. 908. In that case, though there were differences of opinion as to the details of the scheme, the juris-

diction of the court of chancery to frame one in such a case was thus affirmed by the deliberate judgments of five law lords; and all agreed that, for the purpose of ascertaining what was *cy pres* to the particular object which had failed, the court might look at all the charitable bequests in the will; applying in this respect the principle upon which Lord Bacon had acted more than two centuries before in the case of *Bloomfield v. Stowemarket*, above cited.

But the case most like that now before us is that of Lady Mico's Charity, Lady Mico, by her will made in 1670, gave a thousand pounds "to redeem poor slaves in what manner the executors should think most convenient." This charity was established by decree in chancery in 1686. Upon an information filed in 1827, after the fund had accumulated a hundred fold, it was referred to a master to approve of a scheme for the application of the income according to the will of the testatrix, or, if he should find that it could not be executed according to her will, then as near the intent of the will as could be, regard being had to the existing circumstances and to the amount of the fund. The master, by his general report in 1835, stated that the relators had laid before him a scheme for applying the fund to the enfranchisement of slaves in the British Colonies who were too poor to purchase their own freedom; which application, in consequence of St. 3 & 4 Wm. IV. c. 73, abolishing slavery (which took effect in 1834), had become impracticable; that he was of opinion that the testatrix by her will contemplated the redemption of poor slaves in the Barbary States, but that intention could not be carried into effect; and he approved a scheme to apply the capital and income in purchasing and building school-houses for the education of the emancipated apprentices and their issue, qualifying teachers, paying the salaries of masters and other expenses, and to apply the surplus rents to the support of any other schools, and generally in promoting education in the British Colonies. Sir Christopher Pepys, M. R., confirmed this scheme by a decree; and, after he had become lord chancellor, stated the reasons to have been that "in this there was no restriction as to the description of slaves, or the countries in which the slaves were to be looked for;" that upon the reference to the master "it appeared that there were not within any part of the British dominions any poor slaves to be redeemed, but that there were in the colonies many thousands of human beings from whom the odious appellation of slaves had been removed, but whose state was very far short of that of freemen, from whose bodies the chains of slavery had been struck, but whose minds and morals were still in that state of degradation which is inseparable from the unfortunate situation from which they had recently been in part rescued; it was proposed to the master to apply, and he approved of a scheme for the completion of that holy work, by assisting in the education of those poor beings. If, before the slavery abolition act, these funds could prop-

erly have been applied to procuring the redemption of slaves in the colonies, the proposed application for the benefit of the apprentices was doubtless *cy pres* to the intention of the donor." And his reason for not applying *Betton's Charity* in the same manner was that it was in terms limited to slaves in Turkey or Barbary. *Attorney General v. Gibson*, 2 Beav. 317, note; *Attorney General v. Ironmongers' Co.*, Craig & P. 226, 227.

There is no adjudication of this question by the supreme court of the United States. The dicta of Chief Justice Marshall in *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. 1, 4 L. Ed. 499, were based upon an imperfect survey of the authorities, were not required by the decision, and are hardly reconcilable with the more recent judgments of the same court; and that case, as well as *Wheeler v. Smith*, 9 How. 79, 13 L. Ed. 44, arose under the law of Virginia. *Vidal v. Girard's Ex'rs*, 2 How. 192, 11 L. Ed. 205; *Perin v. Carey*, 24 How. 501, 16 L. Ed. 701; *Bartlett v. Nye*, 4 Metc. 380; *American Academy of Arts & Sciences v. President, etc., of Harvard College*, 12 Gray, 593; 2 Kent, Comm. 287. In *Fontain v. Ravenel*, 17 How. 369, 15 L. Ed. 80, the testator authorized his executors or the survivor of them to dispose of the residue of his estate "for the use of such charitable institutions in Pennsylvania and South Carolina, as they or he may deem most beneficial to mankind," and they died without appointing; and it was held that the title did not vest in the executors as trustees, and that according to the English law the disposition would have been in the crown by sign manual. As Mr. Justice McLean, delivering the opinion of the court, said: "Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but behind that is a more formidable objection. There is no expressed will of the testator. He intended to speak through his executors or the survivor of them, but by the acts of Providence this has become impossible. It is then as though he had not spoken. Can any power now speak for him, except the *parens patriæ*?" The further remarks about the power of *cy pres*, if intended to cover a case in which the charitable purposes were described or indicated in the will, were upon a question not before the court. The separate opinion of Chief Justice Taney in *Fontain v. Ravenel* was but his own, based mainly upon that of Chief Justice Marshall in *Baptist Ass'n v. Hart's Ex'rs*. And it is impossible to avoid the inference that the impressions of both of those eminent magistrates were derived from the laws of Maryland and Virginia in which they had been educated, and by which St. 43 Eliz. has been expressly repealed, and charities are not recognized as entitled to any favor, either in duration or construction, beyond other trusts. *Dashiell v. Attorney General*, 5 Har. & J. (Md.) 392, 9 Am. Dec. 572; *Gallego v. Attorney General*, 3 Leigh (Va.) 450, 24 Am. Dec. 650. In North Carolina, the supreme court once declared that it had all

the powers exercised by the English chancellor, either in the equity jurisdiction or under the sign manual; and since, rebounding from that extreme opinion, seems to have adopted the view of Maryland and Virginia. *Griffin v. Graham*, 8 N. C. 96, 9 Am. Dec. 619; *McAuley v. Wilson*, 16 N. C. 276, 18 Am. Dec. 587; *Holland v. Peck*, 37 N. C. 255. There is a dictum to a like effect in *Carter v. Balfour*, 19 Ala. 830. So in New York, the court of appeals, after some division and vacillation of opinion in the course of the frequent changes in the composition of the court, has recently adjudged that in that state the English law of charitable uses has been wholly abrogated by statute, and that charities are within the rule against perpetuities, and have no privileges about private trusts. *Bascom v. Albertson*, 34 N. Y. 584.

On the other hand, the court of appeals of Kentucky, in an able judgment delivered by Chief Justice Robertson, marked the distinction between the power exercised under the sign manual, and that inherent in the equity jurisdiction; and, after speaking of the former as not judicial, added: "The *cy pres* doctrine of England is not, or should not be, a judicial doctrine, except in one kind of case; and that is, where there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal or inappropriate, or which happens to fail, has been prescribed. In such case, a court of equity may substitute or sanction any other mode that may be lawful and suitable and will effectuate the declared intention of the donor, and not arbitrarily and in the dark, presuming on his weakness or wishes, declare an object for him. A court may act judicially as long as it effectuates the lawful intention of the donor." *Moore v. Moore*, 4 Dana (Ky.) 366, 29 Am. Dec. 417. See, also, *Gass v. Wilhite*, 2 Dana (Ky.) 177, 26 Am. Dec. 446; *Curling v. Curling*, 8 Dana (Ky.) 38, 33 Am. Dec. 475. The power of *cy pres*, which was declared by the supreme court of Pennsylvania in *Methodist Church v. Remington*, 1 Watts, 226, 26 Am. Dec. 61, and *Witman v. Lex*, 17 Serg. & R. 93, 17 Am. Dec. 644, not to exist in that state, was the power exercised under the sign manual in case of a gift to superstitious uses, or of any expression of general intention to devote a sum to charitable purposes not designated. In a very recent case, the same court said: "The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity; for equity will substitute another mode, so that the substantial intention shall not depend upon the formal intention." "And this is the doctrine of *cy pres*, so far as it has been expressly adopted by us"—"a reasonable doctrine, by which a well defined charity, or one where the means of definition are given, may be enforced in favor of the general intent, even where the mode or means provided for by the donor fail by reason of their inadequacy or unlawfulness." *Philadelphia*

v. Girard, 45 Pa. 27, 28, 84 Am. Dec. 470. Like principles have been maintained in South Carolina and Illinois. *Attorney General v. Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349; *Id.*, 2 Strob. Eq. 395; *Gilman v. Hamilton*, 16 Ill. 231. The existence of a judicial power to administer a charity *cy pres* where the expressed intention of the founder cannot be exactly carried out has been either countenanced or left an open question in all the New England states except Connecticut. *Burr v. Smith*, 7 Vt. 287, 288, 29 Am. Dec. 154; *Second Congregational Soc. v. First Congregational Soc.*, 14 N. H. 330; *Brown v. Concord*, 33 N. H. 296; *Derby v. Derby*, 4 R. I. 439; *Tappan v. Deblois*, 45 Me. 131; *Howard v. American Peace Soc.*, 49 Me. 302, 303; *Treat's Appeal*, 30 Conn. 113. See, also, 2 Redf. Wills, 815, note; *McCord v. Ochiltree*, 8 Blackf. (Ind.) 15; *Beall v. Fox*, 4 Ga. 427; *Chambers v. St. Louis*, 29 Mo. 590, 592; *Lepage v. Macnamara*, 5 Iowa, 146; *McIntyre v. Zanesville*, 17 Ohio St. 352.

The narrow doctrines which have prevailed in some states upon this subject are inconsistent with the established law of this commonwealth. Our ancestors brought with them from England the elements of the law of charitable uses, and, although the form of proceeding by commission under St. 43 Eliz. has never prevailed in Massachusetts, that statute, in substance and principle, has always been considered as part of our common law. 4 Dane, Abr. 6, 239; *Earle v. Wood*, 8 Cush. 445. Under the Colony charter, charities were regulated and administered, according to the intent of the donors, under the direction of the general court, the court of assistants, and the county courts; and under the Province charter, although no court was vested with equity jurisdiction, charitable bequests were not the less valid. *Anc. Chart.* 52; *Drury v. Natick*, 10 Allen, 180, 181, and authorities cited; *Winslow v. Trowbridge*, stated in 11 Allen, 459, 460. The English mortmain act of 9 Geo. II. c. 36, did not extend to Massachusetts; and the similar provision in Prov. St. 28 Geo. II. c. 9, was repealed immediately after our Revolution by St. 1785, c. 51. *Odell v. Odell*, 10 Allen, 6. Charities are held not to be within the common rule limiting perpetuities and accumulations. *Dexter v. Gardner*, 7 Allen, 243; *Odell v. Odell*, 10 Allen, 1. Charitable bequests to an unincorporated society here, to a foreign corporation or society, or to a particular religious denomination in a certain county, have been carried into effect, even where no trustees have been named in the will. *Burbank v. Whitney*, 24 Pick. 146, 35 Am. Dec. 312; *Bartlett v. Nye*, 4 Metc. 378; *Washburn v. Sewall*, 9 Metc. 280; *Universalist Soc. v. Fitch*, 8 Gray, 421. See, also, *Wells v. Doane*, 3 Gray, 201; *Saltonstall v. Sanders*, 11 Allen, 446.

The intention of the testator is the guide, or, in the phrase of Lord Coke, the lodestone, of the court; and therefore, whenever a charitable gift can be administered according to his express directions, this court, like the court of chancery in England, is not at liberty

to modify it upon considerations of policy or convenience. *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 280; *Baker v. Smith*, 13 Metc. 34; *Trustees of Smith Charities v. Inhabitants of Northampton*, 10 Allen, 498. But there are several cases, where the charitable trust could not be executed as directed in the will, in which the testator's scheme has been varied by this court in such a way and to such an extent as could not be done in the case of a private trust. Thus bequests to a particular Bible society by name, whether a corporation established by law or a voluntary association, which had ceased to exist before the death of the testator, have been sustained, and applied to the distribution of Bibles through a trustee appointed by the court for the purpose. *Winslow v. Cummings*, 3 Cush. 358; *Bliss v. American Bible Soc.*, 2 Allen, 334. At a time when the general chancery jurisdiction of this court over trusts was limited to those arising under deeds and wills, the legislature by a special statute authorized it to hear and determine in equity any and all matters relating to a certain gift to a scientific corporation, to be invested in a certain manner, and paid in premiums for discoveries or improvements on heat or light published in America within two years before each award. Upon a bill being filed, and it appearing that it had become impracticable to carry out the intent of the donor in the mode prescribed, Chief Justice Shaw authorized a different investment of the fund; and, in accordance with a scheme reported by a master, authorized the corporation to apply the surplus income, after paying such premiums, to purchasing books, papers and philosophical apparatus, and making such publications or procuring such lectures, experiments or investigations as should facilitate and encourage the making of such discoveries and improvements; and said: "Whenever it appears that a general object of charity is intended, and the purpose is not unlawful and void, the right of the heir at law is divested." "It is now a settled rule in equity that a liberal construction is to be given to charitable donations, with a view to promote and accomplish the general charitable intent of the donor, and that such intent ought to be observed, and when this cannot be strictly and literally done, this court will cause it to be fulfilled as nearly in conformity with the intent of the donor as practicable. Where the property thus given is given to trustees capable of taking, but the property cannot be applied precisely in the mode directed, the court of chancery interferes, and regulates the disposition of such property under its general jurisdiction on the subject of trusts, and not as administering a branch of the prerogative of the king as *parens patriæ*." "What is the nearest method of carrying into effect the general intent of the donor must of course depend upon the subject matter, the expressed intent, and the other circumstances of each particular case, upon all of which the court is to exercise its discretion. *American Academy v. Harvard College*, 12 Gray, 582. The same principle was also recognized or

assumed in 4 Dane, Abr. 242, 243, in *Sanderson v. White*, 18 Pick. 333, 29 Am. Dec. 591, and other cases already cited. *Baker v. Smith*, 13 Metc. 41; *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 282, 298; *Trustees of Smith Charities v. Inhabitants of Northampton*, 10 Allen, 501, 502.

By Gen. St. c. 113, § 2, this court may hear and determine in equity all suits and proceedings for enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate, "and shall have full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases, where there is not a plain, adequate and complete remedy at law." The powers usually exercised by the court of chancery in the course of its jurisdiction in equity have thus been expressly conferred upon this court by the legislature. The authority of administering a charitable trust according to the expressed intention of the donor, and, when that cannot be exactly followed, then as nearly as possible, is a part of this jurisdiction, which the court is not at liberty to decline. The only question is, whether the facts of the case show a proper occasion for its exercise according to the settled practice in chancery.

In all the cases cited at the argument, in which a charitable bequest, which might have been lawfully carried out under the circumstances existing at the death of the testator, has been held, upon a change of circumstances, to result to the heirs at law or residuary legatees, the gift was distinctly limited to particular persons or establishments. Such was *Russell v. Kellett*, 3 Smale & G. 264, in which the gift was of five pounds outright to each poor person of a particular description in certain parishes, and Vice Chancellor Stuart held that the shares of those who died before receiving them went to the residuary legatees. Such, also, was *Clark v. Taylor*, 1 Drew. 642, in which it was held that a legacy to a certain orphan school by name, which ceased to exist after the death of the testator, failed and fell into the residue of the estate; and which can hardly be reconciled with the decisions in *Incorporated Soc. v. Price*, 1 Jones & L. 498, 7 Ir. Eq. 260; *In re Clergy-Society*, 2 Kay & J. 615; *Marsh v. Attorney General*, 2 Johns. & H. 61; *Winslow v. Cummings*, 3 Cush. 358, and *Bliss v. American Bible Soc.*, 2 Allen, 334. So in *Easterbrooks v. Tillinghast*, 5 Gray, 17, the trust was expressly limited, not only in object, but in duration, to the maintenance of the pastor of a certain church of a specified faith and practice in a particular town, "so long as they or their successors shall maintain the visibility of a church in said faith and order;" and could not have been held to have terminated, had it not been so limited. *Attorney General v. Columbine*, Boyle, Char. 204, 205; *Perry v. Thurston*, 7 R. I. 25; *Dexter v. Gardner*, 7 Allen, 243.

The charitable bequests of Francis Jackson cannot, in the opinion of the court, be regarded as so restricted in their objects, or so limited in point of time, as to have been terminated and destroyed by the abolition of slavery in the United States. They are to a board of trustees

for whose continuance careful provision is made in the will, and which the testator expresses a wish may become a permanent organization and may receive the services and sympathy, the donations and bequests, of the friends of the slave. Their duration is not in terms limited, like that of the trust sought to be established in the sixth article of the will, by the accomplishment of the end specified. They take effect from the time of the testator's death, and might then have been lawfully applied in exact conformity with his expressed intentions. The retaining of the funds in the custody of the court while this case has been under advisement cannot affect the question. The gifts being lawful and charitable, and having once vested, the subsequent change of circumstances before the funds have been actually paid over is of no more weight than if they had been paid to the trustees and been administered by them for a century before slavery was extinguished.

Neither the immediate purpose of the testator—the moral education of the people; nor his ultimate object—to better the condition of the African race in this country; has been fully accomplished by the abolition of slavery.

Negro slavery was recognized by our law as an infraction of the rights inseparable from human nature; and tended to promote idleness, selfishness and tyranny in one part of the community, a destruction of the domestic relations and utter debasement in the other part. The sentiment which would put an end to it is the sentiment of justice, humanity and charity, based upon moral duty, inspired by the most familiar precepts of the Christian religion, and approved by the constitution of the commonwealth. The teaching and diffusion of such a sentiment are not of temporary benefit or necessity, but of perpetual obligation. Slavery may be abolished; but to strengthen and confirm the sentiment which opposed it will continue to be useful and desirable so long as selfishness, cruelty, the lust of dominion, and indifference to the rights of the weak, the poor and the ignorant, have a place in the hearts of men. Looking at the trust established by the fourth article of this will as one for the moral education of the people only, the case is within the principle of those, already cited, in which charities for the relief of leprosy and the plague were held not to end with the disappearance of those diseases; and is not essentially different from that of *Attorney General v. Baliol College*, in which a trust for the education at Oxford of Scotch youths, to be sent into Scotland to preach Episcopalianism in the established church there, was applied by Lords Somers and Hardwicke and their successors to educate such youths, although, by the change of faith and practice of the Church of Scotland, the donor's ultimate object could no longer be accomplished.

The intention of Francis Jackson to benefit the negro race appears not only in the leading clause of the fourth article, and in his expression of a hope that his trustees might receive the aid and the gifts of

the friends of the slave, but in the trust for the benefit of fugitive slaves in the fifth article of the will, to which, according to the principle established by the house of lords in the Case of Betton's Charity, resort may be had to ascertain his intent and the fittest mode of carrying it out. The negroes, although emancipated, still stand in great need of assistance and education. Charities for the relief of the poor have been often held to be well applied to educate them and their children. *Bishop of Hereford v. Adams*, 7 Ves. 324; *Wilkinson v. Malin*, 2 Crompt. & J. 636, 2 Tyrw. 544; *Anderson v. Wrights of Glasgow*, 12 L. T. (N. S.) 807. The Case of Mico Charity is directly to the point that a gift for the redemption of poor slaves may be appropriated, after they have been emancipated by law, to educate them; and the reasons given by Lord Cottenham for that decision apply with no less force to those set free by the recent amendment of the constitution in the United States, than to those who were emancipated by act of parliament in the West Indies.

The mode in which the funds bequeathed by the fourth and fifth articles of the will may be best applied to carry out in a lawful manner the charitable intents and purposes of the testator as nearly as possible must be settled by a scheme to be framed by a master and confirmed by the court before the funds are paid over to the trustees. In doing this, the court does not take the charity out of the hands of the trustees, but only declares the law which must be their guide in its administration. *Shelf. Mortm.* 651–654; *Boyle, Char.* 214–218. The case is therefore to be referred to a master, with liberty to the attorney general and the trustees to submit schemes for his approval; and all further directions are reserved until the coming in of his report.

Case referred to a master.

The case was then referred to John Codman, Esquire, a master in chancery for this county, who, after notice to the trustees and the attorney general, and hearing the parties, made his report, the results of which were approved by the attorney general; and upon exceptions to which the case was argued by W. Phillips for himself and other excepting trustees, and by J. A. Andrew in support of the master's report, before Gray, J., with the agreement that he should consult the whole court before entering a final decree. No account was asked by any party of sums already expended by the trustees.

As to the bequest in the fifth article, the master reported that the unexpended balance (amounting to \$1,049.90) was so small that it was reasonable that it should be confined to a limited territory; and that it should therefore be applied by the trustees, in accordance with their unanimous recommendation, to the use of necessitous persons of African descent in the city of Boston and its vicinity. This scheme was approved and confirmed by the court, with this addition: "Preference being given to such as have escaped from slavery."

As to the sum bequeathed in the fourth article of the will, the master reported that a portion had been expended by the trustees before any

question arose as to its validity; and that but two schemes had been suggested to him for the appropriation of the residue, namely, first, (which was approved by four of the seven trustees who had accepted the trust,) in part to the support of the Anti-Slavery Standard, and in part to the New England Branch of the American Freedmen's Union Commission; or, second, (which was approved by the remaining trustees,) that the whole should be applied to the last named object.

The master disapproved of the first of these schemes; and reported that the Anti-Slavery Standard was a weekly newspaper published in the city of New York with a circulation of not more than three thousand copies, which was established nearly thirty years ago for the purpose of acting upon public opinion in favor of the abolition of slavery; that in his opinion, since the abolition of slavery, and the passage of the reconstruction acts of congress, "the support of a paper of such limited circulation as hardly to be self-sustaining would do very little for the benefit of the colored people in their present status, and its direct influence would be almost imperceptible on the welfare of that class most nearly corresponding to those whom the testator had in view in making this bequest;" and that the argument, that it was evidently the intention of the testator to accomplish the object indicated in the fourth article of his will by means of which a newspaper like this might be considered an example, was answered by the fact that the object for which these means were to be used had been already accomplished without them. The master returned with his report a few numbers of the Anti-Slavery Standard, (taken without selection as they were given to him by the chairman of the trustees,) by which it appeared that it was in large part devoted to urging the passage of laws securing to the freedmen equal political rights with the whites, the keeping of the southern states under military government, the impeachment of the president, and other political measures.

The master reported that he was unable to devise any better plan than the second scheme suggested; that this mode of appropriation was in his opinion most in accordance with the intention of the testator as expressed in the fourth article of the will, because the intention nearest to that of emancipating the slaves was by educating the emancipated slaves to render them capable of self-government; and this could best be done by an organized society, expressly intended and exactly fitted for this function, and which, if the whole or any part of this fund was to be applied to the direct education and support of the freedmen, was admitted at the hearing before him to be the fittest channel for the appropriation. The master returned with his report printed documents by which it appeared that the object of the American Freedmen's Union Commission, as stated in its constitution, was "the relief, education and elevation of the freedmen of the United States, and to aid and coöperate with the people of the South, without distinction of race or color, in the improvement of their condition, upon the basis of industry, education, freedom and Christian morality;" and that the

New England and other branches of the commission were now maintaining large numbers of teachers and schools for this purpose throughout the southern states.

The master accordingly reported that what remained of the fund bequeathed by the fourth article of the will should be "ordered to be paid over to the New England Branch of the Freedmen's Union Commission, to be employed and expended by them in promoting the education, support and interests generally of the freedmen (late slaves) in the states of this Union recently in rebellion." And this scheme was by the opinion of the whole court accepted and confirmed, modified only by directing the executor to pay the fund to the trustees, to be by them paid over at such times and in such sums as they in their discretion might think fit to the treasurer of the branch commission; and by substituting for the words "recently in rebellion" the words "in which slavery has been abolished, either by the proclamation of the late President Lincoln or the amendment of the constitution."

Final decree accordingly.

2. BENEFICIARIES

PEOPLE *ex rel.* ELLERT *v.* COGSWELL.

(Supreme Court of California, 1896. 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269.)

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by the state, on relation of L. R. Ellert, mayor against Henry D. Cogswell, Caroline Cogswell, and others. Judgment for plaintiff, and defendant Caroline Cogswell appeals. Affirmed.

HENSHAW, J.¹¹ Appeals from the judgment and from the order denying a new trial. Defendants Henry D. Cogswell and his wife, Caroline E. Cogswell, upon March 19, 1887, executed to certain trustees, themselves among the number, a deed of trust to real estate in the city and county of San Francisco. The trust was created under the provisions of the act of the legislature entitled "An act to advance learning, the arts and sciences, and to promote the public welfare by providing for the conveyance, holding and protection of property, and the creation of trusts for the founding, endowment, erection and maintenance within this state of universities, colleges, schools, seminaries of learning, mechanical institutes, museums and galleries of art." St. 1885, p. 49. The nature, object, and purposes of the trust were declared to be the erection and maintenance of a polytechnic college for the purpose of giving the boys and girls of the state of California a practical training in the mechanical arts and industries, the better to fit them

¹¹ Part of the opinion is omitted.

to engage in the different pursuits of life. The trustees, including the defendants Cogswell, accepted the trust upon the day of the execution of the deed, and thereafter as a board managed and conducted its affairs. The defendants Cogswell attended the meetings of the board, and participated in its deliberations and acts.

The present action was brought by the state upon the relation of L. R. Ellert, mayor of San Francisco, to have the trust decreed valid, and for relief against certain acts and abuses of the defendants Cogswell and other defendant trustees, which acts, it is alleged, were designed to hinder the management of the trust, and to frustrate its purpose and defeat its object. The nature of these acts need not be specified, as an amicable stipulation was afterwards entered into, which eliminated these matters as issues in the case. Under this stipulation the action was dismissed as to one of the alleged recalcitrant trustees, other trustees were appointed to fill existing vacancies in the board, the Polytechnic College was to be reopened, and the defendant H. D. Cogswell consented to the entry of a judgment against himself decreeing that the deed created a valid and operative public trust. By this stipulation the rights of the wife, Caroline, were protected, and her claims and contentions reserved for adjudication. In the action she answered and filed a cross complaint. By her answer she raised the question of the validity of the trust, and by her cross complaint she pleaded that her hearing was imperfect, and that she did not know that she had signed the deed, nor did she understand its full meaning and import. It was read to her by the notary, but she failed to hear or comprehend it. There was no one present to advise her as to the meaning of the deed and its effect, or to inform her of her rights. She thought the papers were for the purpose of "establishing a school for those of small means," and believed she was merely signing for the incorporation of the college, and was simply accepting the trust as trustee. She discovered, while the paper was being read to her by the notary, that it purported to be a deed of some kind, because she heard him read descriptions of land; but she did not know in what way it concerned her, or that she had signed that particular paper. She trusted her husband, who deceived her in the matter. She had never had independent advice, and did not know that under the law the conveyance, which was of community property, was inoperative unless she joined therein. Had she known, she would not have executed it. She also pleaded that the trust is in contravention of the constitutional inhibition against perpetuities. The answer to this cross complaint was a denial and a plea of the statute of limitations. Defendant Caroline Cogswell also demurred to the complaint, and her demurrer was overruled.

The only ground of demurrer inviting consideration is that the state is not a party in interest, and therefore has not capacity to sue. The objection is not sound, and the demurrer was properly overruled. This action is based upon averments of a public trust. It is brought to remedy abuses in the management of this trust. It is not only the right,

but the duty, of the attorney general to prosecute such an action. The state, as *parens patriæ*, superintends the management of all public charities or trusts, and in these matters acts through her attorney general. Generally speaking, such an action will not be entertained at all unless the attorney general is a party to it. Such was the rule at common law, and it has not been changed in this state. Even in those states, such as Massachusetts, where by special statute the attorney general is instructed to prosecute such actions, it is declared that the statute does not narrow or diminish in this regard the common-law powers incident to the office. *Parker v. May*, 5 Cush. (Mass.) 336. The principle and rule are thus succinctly stated in *Attorney General v. Compton*, 1 Younge & C. Ch. 417: Where property affected by a trust for public purposes is in the hands of those who hold it devoted to that trust, it is the privilege of the public that the crown should be entitled to intervene by its officers for the purpose of asserting, on behalf of the public generally, the public interest and the public right, which probably no individual could be found effectually to assert even if the interest were such as to allow it. 2 Kent, Comm. (10th Ed.) 359; *Lewin, Trusts*, § 665; 1 Daniell, Ch. Prac. § 13; *Perry, Trusts*, § 732.

2. It is next contended that the trust designating for its beneficiaries "the boys and girls of California" is void for uncertainty, because the trustees are not empowered to designate what boys and girls, and, if all applied, the trust would be impossible of execution. It should scarcely be necessary to observe that when the class has been designated this very vagueness and uncertainty and indefiniteness as to individuals and numbers is a necessary and essential element to the creation of a valid charitable trust. *Perry, Trusts*, § 710; *Estate of Hinckley*, 58 Cal. 488. It is in discussing such trusts that the supreme court of the United States says in *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397: "They may, and indeed must, be for the benefit of an indefinite number of persons, for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of the administration to be settled by trustees under the superintendence of a court of chancery."

3. It is claimed that the trust is void as creating a perpetuity which does not come within the exception of the constitution which forbids perpetuities "except for eleemosynary purposes." Herein it is argued that "eleemosynary" pertains exclusively to almsgiving; that alms are given to the poor; and that this trust is generally for "the boys and girls of California," and not specifically for the poor boys and girls. From this claim is made that the constitution never meant to permit perpetuities for strictly educational purposes, or the word "eleemosynary" would never have been used. It may at once be said that the trust creates, and is intended to create, a perpetuity. It may further be said that the beneficiaries under it are not limited to the poor. But

is it for these reasons any the less an eleemosynary trust? It is quite true that the word "eleemosynary" comes to us from the Greek word meaning "alms," but, while it is always interesting to note the origin and first meanings of words, this knowledge is frequently more curious than valuable; while to insist that the original meaning shall govern the word in its modern use and acceptation is very rarely permissible. It is in this way interesting to note that "sycophant" comes from Greek words meaning "fig informer"; but it would scarcely be contended to-day that a man could not properly be called a sycophant unless he had dealings in figs. In short, words by use are sometimes degraded, sometimes ennobled; sometimes narrowed in meaning, sometimes broadened.

"Eleemosynary" has come in the law to be interchangeable with the word "charitable." A charitable trust or a charity is a donation in trust for promoting the welfare of mankind at large, or of a community, or of some class forming a part of it, indefinite as to numbers and individuals. It may, but it need not, confer a gratuitous benefit upon the poor. It may, but it need not, look to the care of the sick or insane. It may, but it need not, seek to spread religion or piety. Schools and libraries, equally with asylums, hospitals, and religious institutions, are included within its scope. It is impossible to enumerate specifically all purposes for which an eleemosynary trust may be created. The difficulty is inherent in the subject-matter itself. With the progress of civilization new needs are developed, new vices spring up, new forms of human activity manifest themselves, any or all of which, for their advancement or suppression, may become the proper object of an eleemosynary trust. As was said by this court in *People v. Association*, 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117: "The enforcement of charitable uses cannot be limited to any narrow and stated formula. As has been well said, it must expand with the advancement of civilization and the daily increasing needs of men. New discoveries in science, new fields and opportunities for human action, the differing condition, character, and wants of communities and nations, change and enlarge the scope of charity; and, where new necessities are created, new charitable uses must be established. The underlying principle is the same; its application is as varying as the wants of humanity."

The objects and purposes of the present trust are purely charitable. The mode of effectuating the charity by the erection and maintenance of a polytechnic college is clearly set forth. The salaries of the professors, teachers, and instructors are to be paid out of the trust funds. Suitable college buildings are to be provided. Tuition is to be absolutely free so long as the resources of the trust will permit, and when a tuition fee is charged it is only to aid in maintaining the institution. Nothing is reserved for profit or gain. All goes to the spread of technical knowledge, and to the gratuitous instruction in the mechanic arts of the boys and girls of the state. Such a trust is in conformity with the act of 1885, and that act in no way contravenes the provisions of

section 9, art. 20, of our constitution. *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; *Vidal v. Girard's Ex'rs*, 2 How. 127, 11 L. Ed. 205; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397; *American Academy, etc., v. President, etc., of Harvard College*, 12 Gray (Mass.) 582; *Whicker v. Hume*, 7 H. L. Cas. 124; *President of United States of America v. Drummond*, 33 Beav. 449. * * *

Other findings are against the averments of defendants' answer that the trust had been abandoned by the trustees; that they had made an improper lease of the trust property, and had violated their trust; that the trust had become impracticable, and that, therefore, the property had reverted, and should, in equity, be decreed to have reverted, to the founders. A trust in this state is not extinguished, nor does the property revert, for any of these reasons. If the trustees abandon, or in any way abuse, their trust, equity will correct the abuses, and remove the offenders. A trust is extinguished by the entire fulfillment of its object, by its object becoming impossible, or by its object becoming unlawful. Civ. Code, § 2279. No one of these contingencies has arisen, and the court was right in finding that the object of the trust had not become impracticable. The founders had reserved no power of revocation (Civ. Code, § 2280), and the acts complained of were mere abuses, which, in the absence of an express condition to that effect, did not work a reversion, but merely warranted the interposition of equity for their correction. *Perry, Trusts*, § 744; *Brown v. Society*, 9 R. I. 177; *Barr v. Weld*, 24 Pa. 84; *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502; *Attorney General v. Town of Dublin*, 38 N. H. 459; *Sanderson v. White*, 18 Pick. (Mass.) 328, 29 Am. Dec. 591. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

KENT v. DUNHAM.

(Supreme Judicial Court of Massachusetts, 1886. 142 Mass. 216, 7 N. E. 730. 56 Am. Rep. 667.)

This was a bill in equity by the plaintiffs, heirs at law of Josiah Dunham, deceased, praying that the will of the said Dunham be annulled, and adjudged invalid and of no effect, so far as it contained a residuary clause, which clause, together with the facts, appear in the opinion. The defendants demurred to the bill. Hearing in the supreme court before C. Allen, J., who reserved the case for the full court.

DEVENS, J. The gift to "Samuel Leeds and Josiah Dunham, Jr., their heirs and assigns, forever, and to the survivors of them, and his heirs, forever, in trust, to sell, dispose of, invest, and manage the same, and appropriate such part of the principal and interest as they may deem best for the aid and support of those of my children, and their descendants, who may be destitute, and, in the opinion of the

trustees, need such aid," will not admit of being construed as a gift to the testator's children and their descendants who might be living at the time of the testator's decease, or that of the last of his children. The language used, as well as the declared purpose, show that it is a gift in trust for the benefit of those who should thereafter, throughout an indefinite period of time, being descendants of the testator, become destitute and in need of aid and support. The words import that the bequest is ultimately to be administered by others than the trustees named, and that the testator has not sought to repose a special confidence in them exclusively, but to establish a permanent trust, for which trustees were ultimately to be appointed according to ordinary rules of courts of equity. That such a gift is too remote, as tending to create a perpetuity, when it is to be held for the benefit of those who may not have been living at the time of the testator's death, or that of his children, and who may not come into being until many years thereafter, cannot be controverted, unless it can be sustained as a public charity. *Nightingale v. Burrell*, 15 Pick. 104; *Brattle Square Church v. Grant*, 3 Gray, 142, 63 Am. Dec. 725; *Sears v. Russell*, 8 Gray, 86; *Thorndike v. Loring*, 15 Gray, 391. The attorney general has therefore been made a party to this bill, as well as all the demandants of the testator. *Jackson v. Phillips*, 14 Allen, 539.

A public or charitable trust may be indefinite in duration, and its general object or purpose, as indicated, being charitable, the application and selection of the particular objects or individuals who are to receive its benefits may be confided to those who are its trustees. That a gift should have this character there must be some benefit to be conferred upon, or duty to be preferred towards, either the public at large, or some part thereof, or an indefinite class of persons. If a trust were created for the benefit of the poor of a particular town or parish, or of persons of a specified class or occupation, as seamen, laborers, or mechanics, it would not be doubted that it would be good as a charity. So, if a sum were bequeathed, the income of which, from time to time, or in the discretion of the trustees, was to be applied to the relief of the destitute, by distribution of fuel or provisions, or in any other similar defined mode, or as the trustees might deem most expedient, the gift would be enforced as a public charity.

The gift in the case at bar is solely for the benefit of the children of the testator, and their descendants. The only public interest that there can be in connection with it is that where, as there may be hereafter, certain destitute persons, descendants of the testator, who might otherwise become a public charge, they will be entitled to relief from this fund. This legacy, it will be observed, is readily distinguishable from one by which the income of a fund is devoted to the poor of a particular town or parish, preference being given to the descendants or the relations of the testator. In such a donation there is a public object, as they are thus provided for only as a part of the poor who are to receive the benefit of the charity, although a preference is

given them, on account of their descent or relationship, in its distribution.

There were certain English cases which, as the trustees contend, offered strong ground for holding this legacy to be public charity. In *Attorney General v. Bucknall*, 2 Atk. 328, (1741,) the point decided was that any person, though the most remote in the contemplation of the charity, might be a relator in an information in reference thereto. The facts, as stated in the note, do not show that any question arose as to whether the bequest was a public charity; the only inquiry apparently being whether the relator was one of the poor relations who were the objects of the bounty. In *White v. White*, 7 Ves. 423, (1802,) it was held that a bequest to poor relations of two families for putting out their children as apprentices, the duration of which would have exceeded the limits allowed by law, unless it was a public charity, might be executed by putting out those who were then ready as apprentices. There was no discussion of the subject in the opinion of the master of the rolls, Sir William Grant. In *Attorney General v. Price*, 17 Ves. 371, (1810,) there was a direction to pay £20 per annum to the testator's poor relations in the county of Brecon, which was held good as a charity, apparently upon the authority of *Isaac v. Defriez*, Amb. 595, and on the ground that it was entitled to have perpetual continuance for the benefit of a particular class of poor. In *Gillam v. Taylor*, L. R. 16 Eq. Cas. 581, it was held that where the testator gave the residue of his real and personal estate to trustees for investment in their joint names, and directed the interest from time to time to be paid to such lineal descendants as they might severally need, that the gift was charitable, and that it need not be distributed to those actually poor, but only to those relatively so, and thus that, if all the relations except one had £20,000 a year, and the latter £10,000 a year, he would be entitled. This decision is treated with but scant respect in *Attorney General v. Northumberland*, L. R. 7 Ch. Div. 745, by Sir George Jessel, M. R., where it is said that such a charity would only be good in favor of those actually poor. In this latter case the gift gave only a preference to the relations of the testator in the distribution of the income of the trust fund to the poor, which was provided for annually.

These cases do not fully sustain the position that the legacy here in question can be upheld as a public charity. In all of them there were persons so situated as to be entitled to the benefit of the charity, so that an indefinite accumulation was not to be permitted in favor of a class which might never have an existence, or might never come into existence within any period of time when its connection with the testator could be traced.

Bequests in favor of poor relations also are for a far more extensive class than descendants. While the failure of issue, and thus the termination of the line of lineal descent, is comparatively common, the ancestors of every person are indefinitely numerous, and there can be

no failure of collateral relations, except such as may arise from the impossibility of tracing the descent of the testator.

Without desiring to express any opinion as to whether we should hold it to be our duty to follow the doctrine of these cases if the question presented by the case at bar was fairly within them, the reasons why the gift of the testator cannot be sustained as a public charity appear to us entirely sufficient. It is the policy of the law to prevent indefinite accumulation of property for the benefit of individuals. The descendants of the testator are now, and have been since his decease, in comfortable circumstances. Not only may a long time elapse before any descendant will exist who can be termed "a destitute person," but such a time may practically never occur, as it may be at so distant a period that descent cannot be traced, or the event of the failure of descent from the testator may render it impossible that it should ever occur. In the expectation of the remote contingency that there shall be a descendant who is a destitute person, the fund is to be permitted to accumulate if the will of the testator is followed. If the line of descent from the testator fails, it will have been accumulated for his heirs, it may be, in a remote generation. There is no general public object sufficient to justify this accumulation in the possible advantage which the public may obtain by having the descendants of the testator protected from beggary, and thus from becoming a public charge. To establish as a permanent charity a provision for a single family, and thus, it may be, to prevent an indefinite accumulation of property which might eventually be solely for the benefit of the testator's heirs, and those who may claim under them, would be foreign to the general principles of our law on this subject, and cannot be justified by so slight a prospective public benefit.

The result is that the portion of the eighth clause of the testator's will which seeks to establish a trust in two-thirds of the residue of his estate for the benefit of his children and their descendants "who may be destitute, and, in the opinion of said trustees, need such aid," must be deemed to be invalid and without effect. Demurrer overruled.

3. DOCTRINE OF CY PRES

See *Jackson v. Phillips*, ante, p. 269.

ESTATES IN EXPECTANCY

I. Reversions ¹

See *Hobson v. Huxtable*, below.

II. Possibilities of Reverter ²

See *Proprietors of Church in Brattle Square v. Grant*, ante, p. 212.

III. Future Estates—At Common Law ³

1. VESTED REMAINDERS

HOBSON v. HUXTABLE.

(Supreme Court of Nebraska, 1908. 79 Neb. 340, 116 N. W. 278.)

On rehearing. Former opinion and the decree of the district court vacated and decree rendered.

For former opinion, see 112 N. W. 658.

Root, C.⁴ In 79 Neb. 334, 112 N. W. 658 et seq., may be found a statement of the facts in this case. A rehearing has been granted and the entire record presented for our consideration.

1. The defendants Huxtable insist that the record does not disclose that Anna E. Hobson owned the real estate in litigation in fee simple; that they stipulated only that she died seised of the real estate; that seisin may be for life or for years, and fall far short of an estate in fee simple; that, as they had interposed the defense of title by adverse possession, the heirs of Anna E. Hobson must trace their title back to the United States. We do not think it necessary to decide the legal definition of the word "seisin," because it was used in this case evidently as a synonym for title in fee simple. The testimony of the witness Tomkins further establishes that Mrs. Hobson purchased the farm some 10 years before her death, and resided thereon with her family from the time she acquired the land until she died.

¹ For discussion of principles, see Burdick, Real Prop. § 138.

² For discussion of principles, see Burdick, Real Prop. § 139.

³ For discussion of principles, see Burdick, Real Prop. §§ 140-149.

⁴ Part of the opinion is omitted.

2. It is claimed that the children of Anna E. Hobson did not take a vested estate in remainder upon the death of their mother. We cannot agree with counsel. The writers refer to the estate included within the homestead as a life estate for the surviving spouse, and either a remainder or reversion in the heirs. "A remainder is a remnant of an estate in land, depending upon a particular prior estate created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it." 4 Kent, Commentaries (13th Ed.) 197. "A reversion is a return of the land to the grantor and his heirs after the grant is over." 4 Kent, Commentaries (13th Ed.) 353. In *Caldwell v. Pollak*, 91 Ala. 353, 8 South. 546, the estates are referred to as "a homestead exemption, actually and rightfully interposed, has the effect in law of dividing the freehold into two quasi ownerships, the one for life, and the other in remainder." The title in the succession of a homestead is not evidenced by written grant, but arises from seisin, the family relation and residence, and those facts take the place of the written instrument that usually evidences the prior estate and the one in remainder. The nature of the estate devolving upon the heirs at the death of the fee-holding spouse is settled as squarely as the decision of this court can establish any principle of law, and is not open to question. In *Schuyler v. Hanna*, 31 Neb. 308, 47 N. W. 933, we held, "Under section 17 of the homestead law of 1879 (Laws 1879, p. 61), that the heirs of the person whose property has been selected for a homestead took a vested remainder therein, subject to the life estate of the surviving husband or wife." In *Fort v. Cook*, 3 Neb. (Unof.) 12, 90 N. W. 634, Mr. Commissioner Hastings reviews the case of *Schuyler v. Hanna*, and clearly demonstrates that the estate of the heir vests upon the death of the parent. *Durland v. Seiler*, 27 Neb. 33, 42 N. W. 741; *Cooley v. Jansen*, 54 Neb. 33, 74 N. W. 391.

3. It is asserted that an action to quiet title cannot be maintained by the heirs during the lifetime of the surviving spouse. Our statutes plainly give the right. Sections 57, 58, 59, c. 73, Comp. St. 1907 (sections 4814-4816). Section 59 is surplusage, unless it extends that right to the remaindermen: "Any person or persons having an interest in remainders or reversion in real estate shall be entitled to all the rights and benefits of this act." Upon the termination of the prior estate, those who were remaindermen or reversioners cease to hold the title by that description, and would fall within the class referred to in section 57, *supra*. We have held the action could be maintained before the surviving spouse departs this life. *Holmes v. Mason*, 80 Neb. 448, 114 N. W. 606. We also held in said case that the statute of limitations bars that right, unless exercised within 10 years of the time the cause for action accrues; the heirs being adults.

It is said that the action may still be maintained by all the heirs of

Anna E. Hobson because commenced within 10 years of the date the youngest child attained his majority; that the cause of action is an entirety and cannot be severed, and hence good as to one is good as to all. *Thompson v. Wiggenghorn*, 34 Neb. 725, 52 N. W. 405, is cited to sustain this proposition. In that case an infant had the right to rebuild a burned mill, whereas, if he had been an adult at the time his ancestor died, he would have forfeited that privilege. The other heirs of the deceased were adults when the father died, and it was held the forfeiture could not apply to one joint owner and not to the others, because the two buildings could not at the one time occupy the same space, and, if the statute worked a forfeiture as to the adults and not as to the infant, the impossible condition of two persons or sets of persons each having the exclusive right to construct a building within the same space at the same time would exist. The rule does not apply in the instant case, because each one of two or more tenants in common may maintain a separate action for the protection or recovery of his estate, and he may not litigate as to other than his own interests in the land. *Johnson v. Hardy*, 43 Neb. 368, 61 N. W. 624, 47 Am. St. Rep. 765. We are also cited to authorities holding that the statute does not commence to run against the remainderman or reversioner until he has a right of entry, and this we do not deny as to actions for the possession of real estate. *Allen v. De Groodt*, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626, and monographic note commencing on page 628; *Smith v. McWhorter*, 123 Ga. 287, 51 S. E. 474, 107 Am. St. Rep. 85; *Hanson v. Ingwaldson*, 77 Minn. 533, 80 N. W. 702, 77 Am. St. Rep. 692; *McCorry v. King's Heirs*, 3 Humph. (Tenn.) 267, 39 Am. Dec. 166-171. * * *

In re KENYON.

(Supreme Court of Rhode Island, 1890. 17 R. I. 149, 20 Atl. 294.)

Case stated for opinion of the court under Pub. St. R. I. c. 192, § 23.

The last will and testament of George C. Kenyon, late of East Greenwich, duly proven, is as follows:

"I, George C. Kenyon, of East Greenwich, in the county of Kent, and state of Rhode Island, do make and publish this my last will and testament in manner following:

"First. After the payment of my just debts and the expenses of settling my estate, I give and bequeath all my estate, both real and personal, of whatever kind or nature, of which I shall die possessed, to Simeon F. Perry, of Westerly, in the county of Washington, and state of Rhode Island, and his heirs, to have and to hold, for and during the natural life of my son, Daniel C. Kenyon, in trust, to collect the rents and profits of the property hereby devised; and after the pay-

ment of all taxes and assessments thereon, and for necessary repairs thereto, to pay over the balance to my said son, Daniel C. Kenyon. And I further authorize and empower said trustee, whenever in his judgment it shall be necessary or proper to raise money for the purpose of paying off incumbrances on said property, or for making repairs, additions, or improvements thereto, or to any part thereof, or if, in his judgment, some other investment shall be more advantageous or profitable, or whenever he shall deem the income or profits arising from said property insufficient to secure the necessary support and sustenance of the said Daniel C. Kenyon, or for his advancement in life, to sell or mortgage or lease for a term of years, with the written consent of the said Daniel C. Kenyon, the above-devised property, or any part thereof, for the best prices that can be obtained therefor. And the duly-executed deed of conveyance of said trustee, with the written consent of the said Daniel C. Kenyon attached thereto, or incorporated therewith, shall in all cases vest a clear and complete title in the purchaser thereof, free from the provisions of this trust. And it shall be the duty of said trustee, with the written consent of said Daniel C. Kenyon, to invest the proceeds of such sales not necessary for the payment of incumbrances on said property, or for repairs thereof, or for the necessary support and advancement of said Daniel C. Kenyon, in suitable improvements upon the remaining property, or in other secure and productive property. And all property purchased shall be held by the trustee under the same title and conditions, and with the same powers and privileges, as the property originally devised to him, and for such sums as said trustee shall expend in the sustenance, support, and advancement of the said Daniel C. Kenyon; the receipt of said Daniel C. Kenyon shall be a sufficient discharge for said trustee: provided, however, that if the said Simeon F. Perry shall die in my life-time, and no other trustee shall have been duly appointed by me in my life-time, the above bequest shall then vest in the person who at the time of my death shall be or shall be acting as town-clerk of East Greenwich aforesaid and his heirs, until a trustee can be appointed as hereinafter provided, except that the said town-clerk or his heirs shall have no power to sell or otherwise convey any of the property hereby devised; and provided, further, that, if the contingency mentioned in the last clause shall happen, or if the said Simeon F. Perry, or any other trustee, shall die during the continuance of this trust, or shall become incapable of fulfilling the duties thereof, or shall refuse to perform them, I hereby authorize and empower the supreme court of this state, sitting in any county thereof, to appoint another trustee; and upon such appointment the above bequest as regards the person or the heirs of the person so deceased or superseded shall cease and determine, and shall vest in full force with the same powers and privileges, and subject to the same conditions, in the person so appointed.

"Second. After the decease of said Daniel C. Kenyon, I give and bequeath all the property affected by the above trust which shall then remain to my own right heirs.

"Third. I appoint said Simeon F. Perry executor of this my last will and testament, and hereby revoke all former wills and testaments by me made.

"In testimony whereof I have hereunto set my hand this thirty-first of the seventh month, A. D. 1863. George C. Kenyon.

"Signed, published, and declared by George C. Kenyon as and for his last will and testament in our presence, who have, at his request, in his presence, and in presence of each other, set our names as witnesses. Ebenezer Slocum. David C. Potter. Joseph W. Congdon."

After the death of Daniel C. Kenyon, childless and intestate, the administrator of his estate and the then heirs at law of George C. Kenyon presented this petition to the court to determine what disposition was made by the will of the latter of the remainder after trustee's estate for the life of Daniel C. Kenyon.

DURFEE, C. J. The case stated shows that George C. Kenyon died at East Greenwich in 1874, leaving real and personal estate, and one son, Daniel C. Kenyon, his only heir at law. He left a will by the first clause of which he devised and bequeathed all the residue of his estate, after payment of his debts, "to Simeon F. Perry * * * and his heirs, to have and to hold, for and during the natural life of my son, Daniel C. Kenyon," in trust for said Daniel, with power to sell, mortgage, or lease the same, with said Daniel's written consent, for the purpose of paying off incumbrances, making repairs, improving the investment, or raising money for the necessary support or for the advancement of said Daniel. The second clause is as follows, to-wit: "After the decease of said Daniel C. Kenyon, I give and bequeath all the property affected by the above trust which shall then remain to my own right heirs." Daniel C. Kenyon died in 1887, without issue. The estate remaining is claimed on the one hand by persons who, if the testator had died childless, would have been at the time of his death, and who are now, his sole heirs at law. On the other hand it is claimed by the administrator on the estate of Daniel C. Kenyon as said Daniel's estate, liable as such for the payment of his debts, his claim being that it vested in said Daniel under said second clause, by way of remainder, at the death of the testator, said Daniel being the testator's only "right heir." We are asked to say which of the two claims is right.

It is contended for the heirs at law that the estate could not pass under the second clause as a remainder, because it was given by the first clause to Simeon F. Perry in fee-simple, after which there can be no remainder. The second clause, it is argued, could only take effect by way of executory devise. We are not convinced by the argument. It is true that the residuary estate is given to Simeon F. Perry "and his heirs," but nevertheless it is only given to him and his

heirs for and during the natural life of Daniel C. Kenyon, and in our opinion the devise, correctly interpreted, creates only an estate *pur autre vie*; i. e., for the life of said Daniel, the heirs of said Perry taking after him, if he had died before said Daniel, as special occupants. *Carpenter v. Dunsmure*, 3 El. & Bl. 918; *Doe v. Robinson*, 8 Barn. & C. 296; *Atkinson v. Baker*, 4 Term R. 229. See, also, *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869, where an estate devised to a trustee and his heirs for objects terminating with lives in being, with remainder over, was held to be constructively only an estate *pur autre vie*, such an estate being sufficient for all the purposes of the trust. We think there was nothing to prevent the estate from passing under said clause by way of remainder.

It is contended for the heirs at law that the language of the first clause is such as shows an intent on the part of the testator to give to his son, Daniel, only an estate for life. The first clause clearly shows an intent to put the estate, during the life of this son, in the trammels of a trust, but it does not in express terms limit the son to the estate so put in trust, nor use any language which is necessarily inconsistent with his taking in remainder. It is urged that the powers given to the trustee to dispose of the entire estate for the son's benefit, but not without the son's written consent, would not have been given so if the testator had intended to have his son take not only the equitable life-estate, but also the legal remainder. We do not think this is clear, since the powers, if not necessary, might be convenient, and would tend to give the trustee a restraining and protective influence. The great obstacle to the construction contended for by the heirs at law is that the estate was given by the testator in remainder to his "own right heirs," and the son answered to that description at the testator's death. We are bound to hold that the words were used in their proper technical meaning until the contrary clearly appears.

The counsel for the heirs at law contend that Daniel could not have taken a vested remainder under the second clause, because the clause was not intended to take effect until after his death, being then intended to take effect in favor of the persons then answering to the description of the testator's right heirs; or, in other words, that the remainder was contingent until then, the persons entitled being previously undetermined. In support of this contention he directs attention particularly to the language of the second clause, which gives, after the clause of Daniel, not "the remainder of the estate," but "all the property affected by the above trust which shall then remain." The view is not without force, but the precedents are against it. The estate given by the second clause does not vest in possession until after Daniel's death; but the question is, when did it vest in title or ownership? This question is to be decided in the light of the rule that the law favors vesting very strongly, and will not regard a remainder as contingent, in the absence of very decisive terms of con-

tingency, unless the provisions or implications of the will clearly require it, and that words expressive of future time are to be referred to the vesting in possession, if they reasonably can be, rather than to the vesting in right. 2 Jarm. Wills, (5th Amer. Ed.) 421, note; Cusack v. Rood, 24 Wkly. Rep. 391; Bullock v. Downes, 9 H. L. Cas. 1.

The words "I give and bequeath," in a testamentary paper, says Chief Justice Shaw, in *Eldridge v. Eldridge*, 9 Cush. (Mass.) 516, 519, "import a benefit in point of right, to take effect upon the decease of the testator and the proof of the will, unless it is made in terms to depend on some contingency or condition precedent." This remark applies pointedly to said second clause, as will clearly appear if we slightly alter the form, without altering the sense, so that the clause shall read thus: "I give and bequeath all the property affected by the above trust, which shall remain after the decease of said Daniel C. Kenyon, to my own right heirs." The gift so expressed is clearly immediate, though how much will eventually pass by it is uncertain, to be ascertained only at the death of Daniel. The same uncertainty would exist if this were the form of the gift, to-wit: "I give to A. for life, with power, in case the income is insufficient for his comfortable support, to sell and use the corpus or principal therefor, so far as required, and after the death of A., to B. and his heirs;" and yet, without doubt, the remainder under such a devise would vest immediately at the testator's decease. It would vest, subject to be divested, either wholly or in part, by the exercise of the power. The devise in either form is in effect the same, and so likewise is it, in our opinion, in legal construction, at least so far as the question of vesting is concerned.

In *Surman v. Surman*, 5 Madd. 123, the gift was of personal property in this wise, to-wit: "I give and bequeath the same to my wife for life, or during widowhood, with power to use and appropriate the same as she thinks proper for her own benefit, or the maintenance of my nephew and daughter-in-law during minority; and on her decease I give and bequeath the same, or so much of the same as shall then remain, to said nephew and daughter-in-law." And the court held that upon the marriage or death of the wife the remainder of the capital unapplied was well limited to the nephew and daughter-in-law. In *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23, the gift included real and personal estate, and was thus: "I do give, devise, and bequeath unto my wife, * * * to her use and disposal during her natural life, and what is remaining at her decease undisposed of by her I give, devise, and bequeath to D. and his heirs." Held, that D. took a vested remainder subject to be divested by the executor of the power. These cases, in our opinion, are not distinguishable in point of principle from the case at bar. In *White v. Curtis*, 12 Gray (Mass.) 54, it was decided that a devise in trust, to apply the income, and if necessary the principal, to the support of the testator's sons for

life, and after their death to divide the remainder among his grandchildren, gives each grandchild a vested interest at the death of the testator. See, also, *Ackerman v. Gorton*, 67 N. Y. 63.

Our conclusion is that said second clause does not show clearly an intent on the part of the testator to have the property given thereby go, after the death of his son, to the persons then answering to the description of his own right heirs.

If the first and second clauses, taken separately, do not show such an intent, do they, taken together, show it? We think there can be no doubt if, the will remaining otherwise the same, the immediate gift were to some person other than the son, or to the son he being one of several heirs at law, that the son would take at the death of the testator a vested remainder under said second clause, solely in the first case supposed and together with his co-heirs in the second. The question, then, is whether the fact that he is the sole heir at law is sufficient to exclude him by implication from taking under the second clause, and to carry the estate given thereby over until after his death to the persons then answering to the description of the testator's right heirs. The case of *Miller v. Eaton*, Coop. 272, decided A. D. 1815, by Sir William Grant, supports the affirmative of this question. The cases of *Jones v. Colbeck*, 8 Ves. 38, (A. D. 1802;) *Butler v. Bushnell*, 3 Mylne & K. 232, (A. D. 1834;) and *Briden v. Hewlett*, 2 Mylne & K. 90, (A. D. 1831,)—likewise go some way in support of it, but in them there were other indications of intent which influenced the decision.

Mr. Jarman remarks that *Miller v. Eaton* is the only case where the fact of the prior legatee being the sole "next of kin" of the testator at his death has been held sufficient to exclude him from taking in remainder under that designation. The words relied on as showing an intent to postpone the vesting in *Butler v. Bushnell*, were "to such persons as should happen to be my next of kin according to the statute of distributions;" and in *Briden v. Hewlett* were "to such persons as would be entitled by the statute of distributions,"—these words being regarded as looking to the future, and so indicating that the gift over was intended to take effect, in right as well as in possession, at the expiration of the prior estate. These cases have been a good deal doubted and criticised, and Mr. Jarman says of them that "at the present day it is not probable such decisions would be made." 2 Jarm. Wills, (5th Amer. Ed.) 134. The case of *Miller v. Eaton* is not now followed as authority in England.

The rule which is recognized in the later English cases as the correct rule is stated by Sir James Wigram, in *Say v. Creed*, 5 Hare, 580, 587, in the words following, to-wit: "Where a testator gives property to a tenant for life, and upon the death of the tenant for life to his next of kin, and there is nothing in the context to qualify, or in the circumstances of the case to exclude, the natural meaning of the testator's word, the next of kin of the testator living at his death will

take; and if the tenant for life be such next of kin, either solely or jointly with other persons, he will not on that account only be excluded." See, also, to the same effect, *Cusack v. Rood*, 24 Wkly. Rep. 391, per Jessel, M. R., A. D. 1876. Of course if the property be real, "heirs at law" takes the place of "next of kin," in any statement of the rule.

American cases that are directly in point are not numerous. The following cases are cited for the administrator: *Harris v. McLaran*, 30 Miss. 533; *Rand v. Butler*, 48 Conn. 293; *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387. The first case is thus stated in the marginal note: "A., the father, gave to C., by deed in trust, for B., his only child, several slaves for life, and after her death to her child or children, and, in default of issue living at her death, then to the lawful heirs of A., the donor. A. died leaving B. his only heir at law, who afterwards died without issue. Held, that an absolute estate in fee vested in B. by the terms of the gift; but if it were otherwise the limitation over to his lawful heirs remained in A. as his old reversion, and at his death went to B., as his next of kin, and not to those who by the death of B. became next of kin." In *Rand v. Butler*, the testator gave, by will, real and personal estate in trust for B. for life, and directed the trustees, after B.'s death, to transfer the same to the testator's heirs at law. B. was an only child, mentally weak. He died without issue. The question was whether the heirs at law meant by the will were the testator's heirs at law at his own or at B.'s death. The court held that, to warrant giving the word "heirs" any other than its ordinary meaning, it must be clear that the testator intended such other meaning; that such an intention could not be inferred from the facts that B. was mentally weak, that the testator put the property given to him for life in trust, and that he used "heirs" in the plural, B. being the sole heir; and that if the heirs meant were those at B.'s death, the gift over was void, under the Connecticut statute against perpetuities, so that the result would be the same whichever construction was adopted. The case is not a full precedent, but, so far as it goes, it is strongly in favor of the construction contended for by the administrator. In *Stokes v. Van Wyck*, B., dying in 1834, devised real estate to his daughter, Mrs. W., for her life, remainder in fee to her issue, and in default thereof to his own right heirs. Mrs. W. was at the testator's death his only child. In 1857 she sold and conveyed the estate. She died in 1884, without issue. In ejectment by the testator's heirs living at Mrs. W.'s death against her grantees to recover the estate, it was decided that the grantees acquired a perfect title by Mrs. W.'s conveyance. The case follows the later English decisions, and is fully in point.

The counsel for the heirs at law have cited no case that bears specifically on this point. They contend generally that the intention of the testator must govern, and that when that appears it overrides all rules and precedents, making its own law. This is generally so; but the

intention that has this effect is the intention testamentarily expressed, and when the testator uses familiar legal words he must be presumed to have used them in their meaning till the contrary clearly appears. Says the court in *Harris v. McLaran*, supra: "We cannot indulge in any hypothesis as to the intention of the donor. We can only know that intention by referring to the language which he has employed, and to those associated circumstances which the law has declared shall indicate his wishes. The terms 'lawful heirs,' 'right heirs,' and 'heirs' are synonymous. Their signification is fixed by law; and when they are used in a deed or will without any superadded words or phrases indicating a different meaning, they are always understood to be used according to their legal acceptance." It is a point in favor of the construction for which the administrator contends that the remainder given over to the testator's own right heirs is, strictly speaking, expectant on the determination, not of the son's equitable life-estate, but of the trustee's legal estate *pur autre vie*, so that there was no merger of the title, the life-estate being equitable, and the remainder legal.

The court declare it to be their opinion that Daniel C. Kenyon took, under the will of his father, George C. Kenyon, the estate given and bequeathed by the second clause thereof, by way of vested remainder in fee, and that on said Daniel's death the same descended to his heirs and legal representatives, subject to the payment of his debts.

2. CONTINGENT REMAINDERS

SULLIVAN v. GARESCHE.

(Supreme Court of Missouri, Division No. 1, 1910. 229 Mo. 496, 129 S. W. 949.)

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Suit to quiet title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), by Nellie P. Sullivan against William McRee Garesche. Decree for plaintiff and defendant appeals. While the cause was pending before the Supreme Court defendant died and Mary T. Garesche, his widow, was appointed guardian ad litem of his minor children, and the cause was revived in their names as appellants. Affirmed.

VALLIANT, J. Since this cause has been pending in this court the appellant has died, leaving Mary T. Garesche, his widow, and Ferdinand T. Garesche, Marie Elsie Garesche, and Eugenie Terese Garesche, his three children, who are minors and his sole heirs at law, and after due service of scire facies on them, Mary T. Garesche has been appointed and qualified as guardian ad litem of the minor children, and the cause has revived in their names as appellants.

It is a suit to quiet title under section 650, Rev. St. 1899 (Ann. St. 1906, p. 667). The property in question is a lot in block 276 of the

city of St. Louis particularly described in the petition. Plaintiff claims to be the absolute owner in fee of the lot. Defendant in his answer claimed an undivided vested interest in the lot under the will of his grandmother, Maria Taylor, or an undivided vested interest in reversion as an heir at law to his grandmother. The decree of the court was that plaintiff was the absolute owner of the whole lot in fee, and that defendant had no interest in it; from that decree defendant appealed.

The title to an undivided one-third of the lot was vested absolutely in Maria Taylor at the time of her death. The other two-thirds interests have been acquired and are now held by the plaintiff. The plaintiff has also acquired and now holds all the interests of all the devisees under the will of Maria Taylor and of her heirs at law, except the interest of the original defendant and appellant, Wm. McRee Garesche, if any he had. The decision of the cause will depend on the construction of the will of Maria Taylor, which, or so much of it as bears on the matter in controversy, is as follows:

"1st. I give and bequeath to my children, Rose, Anna, Lise, Von, and Groff, the sum of one dollar each.

"2nd. All the rest and residue of my property of which I may be possessed at the time of my death, I give and bequeath to my daughters Kate and Julia, in equal parts between them. To have and to hold the same, as hereinafter stated. In case of the marriage or the death of either of my said daughters Kate and Julia, the share of the one marrying or dying shall go to the other.

"In the event of the marriage of both of my said daughters Kate and Julia, said property shall be divided equally among all of my children.

"In the event of the death of both of my said daughters Kate and Julia before marriage, said property shall be divided equally among my surviving children."

All the children of testatrix named in the will, seven in number, were living at her death, and all are now living except the daughter, Lise, who has since died, leaving her only heir the original defendant, Wm. McRee Garesche. Neither of the daughters, Julia and Kate, has yet married.

1. Assuming for the present that it was only a life estate given to the daughters, Kate and Julia, with remainder over, was it a vested or a contingent remainder? There are two events forecast in the will according to which the estate given to the two daughters is to cease or determine, to wit: Marriage, and death without marriage. If one should marry and the other not, the estate of the married one is to go to the other; if both should marry, the estate of both is to determine, and the property is "to be divided equally among all my children;" if both should die before marriage, the "property shall be divided equally among my surviving children."

There is not much difference between counsel on the effect of the condition that marriage should cause a forfeiture of the estate. In his answer to the petition the defendant said that he was advised that that feature of the will was void, because it was in total restraint of marriage; but appellants now take the position that that feature of the will is not entirely in restraint of marriage but only partly so since by marriage the daughter does not lose all interest in the property, but comes in under the clause "all of my children" among whom the property is to be equally divided, in the event of the forfeiture of the particular estate by the marriage of both. But the interest which marriage would forfeit, if effect is given to that part of the will, is not compensated by a share with the other children which, as compared with the estate forfeited, is but a small part. The only intention of the testatrix, as it very clearly appears, is that the only preference given these two daughters, over all the other children, is to be forfeited if they marry. That feature of the will is in restraint of marriage and is therefore void.

The law on this subject received the earnest consideration of this court in an early case, and the doctrine there laid down has been the law of this state ever since. *Williams v. Cowden*, 13 Mo. 212, 53 Am. Dec. 143. In that case the testator had devised land to his son and daughter with the provision, "if his said daughter should marry or die," the land should go exclusively to the son. The court held that that provision as to marriage was void. In commenting on the subject the court said: "Upon the general proposition, the preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality and filial obedience and reverence, are deemed to be objects too important to society to be weighed in the scale against individual or personal will." The only exception to this rule found in our reports is in relation to a will by a husband making provision for his widow during her widowhood. *Walsh v. Matthews*, 11 Mo. 134; *Dumey v. Schoeffler*, 24 Mo. 170, 69 Am. Dec. 422. In the latter case the court referred to *William v. Cowden* and showed how it was distinguished from that case and showed the reason for making an exception in favor of testamentary provisions for widows during widowhood.

We hold that so much of this will as attempts to provide that, on the marriage of either of these daughters, her estate should go to the other, and, upon the marriage of both, the whole property should be divided among all of the children of the testatrix is void. The will is therefore to be construed as if those words were not contained in it. That elimination leaves the will as providing only that in case of the death of either of the two daughters her estate should go to the other, and in case of the death of both, before marriage, the property should be divided among "my surviving children." The other children have no interest in the event that would cause the estate of

one of the two daughters to go to the other; they are concerned only in the event that would cause the particular estate to cease and the property be divided among all the surviving children of the testatrix. That event is the death of both the daughters without either having been married. It is not in restraint of marriage, and therefore not unlawful, for a testator to devise certain property to one of his children, and provide that in case the child should die without having been married, the property should go to another or others. Provisions of that kind are not uncommon and are legitimate. Under the terms of this will the other children of the testatrix can have no interest in this property, until these two daughters die without either having married. These two daughters, possibly in deference to their mother's wish, have not yet married, but what is more natural than that they should, or more probable than that they will? They would forfeit no interest in the property if they should marry, and if they or either of them should marry it would be the end of all expectation of the other children to take under the will, because then the event on which the remainder depends, that is, the death of both without having been married, could never occur. Is the estate which is to take effect on the death of the two daughters, without having been married, a remainder, and, if so, is it a vested or a contingent remainder?

Fearne divides contingent remainders into four classes, from which we take two: "1. Where the remainder depends entirely on a contingent determination of the preceding estate; as, if A. makes a feoffment to the use of B. till C. returns from Rome, and after such return of C., then to remain over in fee. * * * 4. Where a remainder is limited to a person not ascertained, or not in being, at the time when such limitation is made; as, if a lease be made to one for life, remainder to the right heirs of J. S. who is living, or remainder to the first son of B., who has no son then born, or if an estate is limited to two for life, remainder to the survivor of them in fee." 2 Fearne (4th Am. Ed.) §§ 184-187. That is to say, the remainder is contingent if the event on which it is to take effect is contingent, or if at the time of creating the estate the person who is to take is not ascertained. Both those contingencies are present in this case. The event on which the remainder, if it be a remainder, is to take effect, that is, the death of both, without having been married, may or may never occur; death is certain, but that they will not marry is not certain; and second, which, if either or any of the other children of the testatrix will be living when the particular estate determines, is also uncertain.

The last proposition depends on whether the words "my surviving children" mean those living at the death of the testatrix, or those living at the termination of the particular estate. The use of that term, "surviving children," is very common in wills, and the question whether

it means children surviving at the death of the testator, or at some other period, has been much discussed and variously decided, but in every case the decision is aimed to meet the intention of the testator in the particular will, as such intention is gathered from the whole will and the circumstances to which it applies. No unvarying rule can be laid down for the interpretation of those words or words of similar meaning, but, subject to exception, when the facts of the particular case require it, the general rule is that if an estate is given by will to the survivors of a class to take effect on the death of the testator, the word "survivors" means those living at the death of the testator; but if a particular estate is given and the remainder is given to the survivors of a class, the word "survivors" means those surviving at the termination of the particular estate.

There is a learned discussion of this subject in each of the briefs with which we are favored, and authorities are there collected and cases discussed. But we do not think it would profit to attempt to review the authorities referred to, since this court has in at least two cases gone over the whole field and laid down the rule as we have above stated it. *De Lassus v. Gatewood*, 71 Mo. 371, and *Dickerson v. Dickerson*, 211 Mo. 483, 110 S. W. 700. We hold that the words, "my surviving children," in Maria Taylor's will mean those of her children who might be living at the time when the estate given to the two daughters should determine; that is, on the death of both before marriage. It was therefore uncertain at the death of the testatrix which, if either, of her children would be living at that time, and the remainder, if it is a remainder, is therefore contingent. Wm. McRee Garesche's mother having only a contingent interest in the estate thus created, that interest was extinguished by her death, and therefore her heir has no interest under the will in question.

2. But suppose both Kate and Julia should never marry and no one of the other children of testatrix should survive them, what then would become of the estate? If there was a remainder over and no remainderman to take it, it would go back to the estate and descend to the heirs of Maria Taylor. But would there, under the terms of this will, be any remainder over? A contingent remainder cannot take effect, until the event or the fact on which it depends occurs or comes into existence. If an estate is devised to A. for life, remainder to B. when C. returns from Rome, if C. dies without having returned from Rome, there is no remainder. If an estate is devised to A. for life, remainder to the first son born to B., and B. should die having no son born to him, there is no remainder. In those two supposed cases, on the falling in of the life estate, what remains would be a reversion, going back to the grantor or his heirs. But if the particular estate is not a mere life estate, if it is a determinable fee, liable to be cut down on the happening of the event on which the future estate

depends, and that event does not occur, then the fee is not cut down and there is no reversion.

The will of Maria Taylor does not in terms give to the two daughters named a life estate; it gives them the property in fee, subject to being cut down to a life estate in the event of their death, without ever having married. The language of the will is: "All the rest and residue of my property of which I may be possessed at the time of my death, I give and bequeath to my daughters Kate and Julia, in equal parts between them. To have and to hold the same, as hereinafter stated." That is to say, it is an absolute estate, except as it might be cut down as thereafter specified. Under the express terms of our statute, section 4646, Rev. St. 1899 (Ann. St. 1906, p. 2517), words of inheritance are not necessary in a will to create an estate in fee. When an estate is granted it is limited or qualified only by words in the will limiting or qualifying it. The only words in this will limiting or qualifying the estate granted are: "In the event of the death of both of my said daughters Kate and Julia before marriage, the said property shall be divided equally among my surviving children." Therefore if they or either of them should marry, the event on which their estate might be cut down can never occur, and their estate will remain absolute.

If the language of this will had been: All the rest and residue of my property I will and bequeath to my daughters, Kate and Julia, and to their heirs and assigns forever in fee simple, with this conditional limitation, however, that is to say, if neither of them should ever marry, the fee is to determine on the death of the survivor of them and the property is to be divided equally among my surviving children, its legal effect would not have been at all different from what it is in the language used.

The will shows the intention of the testatrix to dispose of her whole estate. On the death of the testatrix that fee vested in these two daughters, subject to be determined at their death, if they should not have married; but if that event should occur the will did not leave the fee to revert to the heirs of the testatrix, but provided how it should go, that is, to "my surviving children," who, in that event, would take as purchasers, not as heirs. But the will does not expressly provide for one possible event, that is, the death of all her other children before that of the two daughters named, and afterwards, their death without having been married. But there was no necessity for providing for that event, because then one of the contingencies on which the fee was to determine would not have occurred; that is, there would be no one to whom the executory devise could apply to take the fee.

A remainder cannot be limited on a fee, even though it be a determinable fee; therefore the devise to take effect on the determination of the fee in this case would not be a remainder, but an execu-

tory devise. 2 Washburn, Real Property (3d Ed.), § 1744; Tiedeman, Real Property (6th Ed.), § 392. But an executory devise may be contingent not only on the event that is to determine the fee, but also on the being of the person to take when the event occurs. "Where the estate is to vest upon an uncertain event or in a person not definitely ascertained, the executory devise is contingent, and partakes of the nature of a contingent remainder." Tiedeman, Real Property, § 386. One of the distinctions between a remainder and an executory devise is that a remainder follows a particular estate, while an executory devise follows a fee. 2 Washburn, Real Property, § 1757. After a particular estate something remains, after a fee nothing. If there be no remainder to go into effect on the determination of the particular estate, or no one to take the remainder, the fee reverts to the grantor or his heirs. If there be no executory devise to take effect on the happening of the condition on which the fee was to determine, or no one to take it, the fee is not cut down, but remains, unless there is something else in the will to show that the intention of the testator was that the fee should determine absolutely on the happening of the condition, without reference to the devise over.

The intent of the testatrix shown in this will was to dispose of her whole estate, leaving none of it to be disposed of by the statute of descents, giving it all to her children. Her two daughters named were her first care, but in a certain event the estate given to them was to be cut down in favor of her other children surviving them. The testatrix did not intend to cut down the fee on the death of the two daughters, independent of the provision to follow thereupon for her other children. The devise over to the surviving children was the only purpose of the cutting down of the fee, and if that purpose could not be accomplished the fee would not be cut down, but would remain as first given, and there would be no reversion; therefore, if there were no children surviving to take the estate, the fee remained in the two daughters. The words "surviving children" as used in this will have the same meaning when the estate over is considered to be an executory devise as they would have if it were a remainder; that is, those children of the testatrix surviving the two daughters to whom the estate is first given. The mother of the original defendant herein having died, her contingent interest in the devise over, whether it be called a remainder or an executory devise, terminated with her death, and therefore did not descend to her son.

The trial court had the correct view of the law of this case. The judgment is affirmed. All concur.

3. RULE IN SHELLEY'S CASE ⁵

BAILS v. DAVIS.

(Supreme Court of Illinois, 1909. 241 Ill. 536, 89 N. E. 706, 29 L. R. A. [N. S.] 706.)

Appeal from Circuit Court, Macon County; W. C. Johns, Judge.

Bill by Jewell H. Bails and others against Henry Davis and others. Decree of dismissal, and complainants appeal. Reversed and remanded, with directions.

DUNN, J. A demurrer was sustained to a bill for partition filed in the circuit court of Macon county, the bill was dismissed for want of equity, and the complainants have appealed.

The complainants deraign title from Jonas Nye. He conveyed the premises by a statutory quitclaim deed "to Joseph Kretzer and Mora Kretzer, his wife, during their natural lives and after their death to the heirs of said Joseph Kretzer." The Kretzers were afterward divorced, and Mora Kretzer conveyed all interest in the premises to Joseph Kretzer, whose title by subsequent conveyances has become vested in the complainants. Joseph Kretzer has two sons, one of whom conveyed his interest in the premises to the other, who was made a party to the bill and filed the demurrer.

Appellants claim to be seised of the premises in fee simple. Whether they are so seised depends upon the question whether the title conveyed by Jonas Nye to Joseph Kretzer was a fee or only a life estate. The language of the deed purports to convey the premises to the grantees during their joint lives, and, after their death, to the heirs of Joseph Kretzer. Appellants claim that this deed is within the rule in Shelley's Case, and conveyed a fee to Joseph Kretzer, subject only to the life estate of Mora Kretzer as a tenant in common of the premises, and that, by the conveyance of her interest, the whole estate vested in Joseph Kretzer. No brief has been filed on behalf of the appellees.

Under the rule in Shelley's Case, which is in force in this state, if an estate for life is granted by any instrument and the remainder is limited by the same instrument, either mediately or immediately, to the heirs of the life tenant, the life tenant takes the remainder as well as the life estate. The rule is one of the most firmly established rules of property and is unshaken in this state. In determining whether it is applicable in a given case the question does not turn upon the quantity of estate intended to be given to the first taker, whether a life estate or more, but upon the nature of the estate intended to be given to the heirs, whether by inheritance or otherwise. *Vangieson v. Henderson*, 150 Ill. 119, 36 N. E. 974; *Ward v. Butler*, 239 Ill. 462, 88 N. E. 189, 29

⁵ For discussion of principles, see *Burdick*, Real Prop. § 149.

L. R. A. (N. S.) 942. When the heir takes in the character of heir, he must take in the quality of heir, and all heirs taking as heirs must take by descent. *Baker v. Scott*, 62 Ill. 86. The limitation to heirs by that name as a class, to take in succession from generation to generation, requires the estate of inheritance imported by that limitation to vest in the first taker. The language of the deed clearly indicates the nature of the estate intended to be given to the heirs of Joseph Kretzer. He is given an estate for life with remainder in fee to his heirs as a class, without reference to individuals or any other condition. The estate thus given to the heirs by the operation of the rule vests in the life tenant.

The requisites of the rule are stated to be, first, a freehold estate; second, a limitation of the remainder to the heir or heirs of the body of the person taking the freehold estate by the name of heirs as a class and without explanation, as meaning sons, children, etc.; third, the estates of freehold and in remainder must be created by the same instrument; fourth, the estates must be of the same quality—that is, both legal or both equitable. *Baker v. Scott*, supra; *Ward v. Butler*, supra. All these requisites are present here, viz., a life estate to Joseph Kretzer and a remainder in fee simple to his heirs—both legal estates created by one deed. Two reasons suggest themselves which might be urged against the application of the rule: (1) The life estate is in one-half the property only, while the remainder is in the whole; (2) the life estate might be determined by the death of Mora Kretzer in the lifetime of Joseph, thus destroying the remainder by determining the particular estate before the happening of the contingency which would determine the persons who would succeed to the remainder. Neither of these reasons, however, is a valid objection to the application of the rule. It is not a requisite that the estate given to the ancestor, and that to the heirs shall be of the same quantity. *Ward v. Butler*, supra. The rule has no effect upon the estate given to the ancestor. It affects only the remainder given to the heirs, and causes such remainder to vest in the ancestor, and not in the heirs. If there is a merger in the ancestor, it follows, not as a necessary result of the operation of the rule, but from the operation of another independent rule of law in regard to separate estates which in any manner become vested in one person.

In regard to the destruction of the supposed contingent remainder to the heirs of Joseph Kretzer who cannot be known in his lifetime, by the termination of the particular estate before his death, the rule that contingent remainders are destroyed which do not vest at or before the termination of the particular estate has no application. There is no contingency, because the remainder which is expressed to be to the heirs of Joseph Kretzer the law declares to be a remainder to Joseph Kretzer, the same as if it had been made expressly to him and his heirs. Where there is a limitation to several for their lives with a remainder in fee to the heirs of one of them, the estate in remainder vests at once in the ancestor to whose heirs it purports to be given.

Fuller v. Chamier, L. R. 2 Eq. 682; Bullard v. Goffe, 20 Pick. (Mass.) 252. The limitation to the heirs must be to the heirs of a person taking a particular estate of freehold, but if it is confined to such heirs then it is immaterial whether there be several ancestors taking the particular estate or only one; nor whether their estates be several, provided they all take, or joint; nor whether the remainder be to the heirs of all or only of some or one of such ancestors; nor whether the estate to the ancestor be such as may possibly determine in the lifetime of such ancestor or not. Watkins on Descent, 162-164; Fearne on Contingent Remainders (4th Ed.) 23-30; 1 Preston on Estates, 313-320; Rogers v. Down, 9 Mod. 292; Merrill v. Rumsey, 1 Keb. 688. Fearne states the rule as follows (page 25): "Whenssoever the ancestor takes any estate of freehold, whether for his own life or the life of another, or whether it be of such a nature that it may determine in his lifetime or not, and there is afterwards, in the same conveyance, a limitation to his right heirs or heirs in tail (either immediately, without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such mean estate), there such subsequent limitation to the heirs or heirs in tail vests immediately in the ancestor and does not remain in contingency or abeyance, with this distinction: That, where such subsequent limitation is immediate, it then executes in the ancestor and becomes united to his particular freehold, forming therewith one estate of inheritance in possession; but, where such limitation is mediate, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates."

The deed of Jonas Nye conveyed to Joseph Kretzer and Mora Kretzer an estate, as tenants in common, during their joint lives with a remainder in fee to Joseph Kretzer. The conveyance of Mora Kretzer to Joseph Kretzer vested the latter with the whole title.

The court erred in sustaining the demurrer to the bill, and the decree will be reversed and the cause remanded to the circuit court, with directions to overrule the demurrer. Reversed and remanded, with directions.⁶

⁶ The rule in Shelley's Case is also in force in Delaware (Jones v. Rees, 6 Pennewill, 504, 69 Atl. 785, 16 L. R. A. [N. S.] 734 [1908]), District of Columbia (Vogt v. Vogt, 26 App. D. C. 46 [1905]), Florida (Russ v. Russ, 9 Fla. 105 [1860]), Indiana (Perkins v. McConnell, 136 Ind. 384, 36 N. E. 121 [1894]), Maryland (Cook v. Councilman, 109 Md. 622, 72 Atl. 404 [1909]), North Carolina (Tysou v. Sinclair, 138 N. C. 23, 50 S. E. 450, 3 Ann. Cas. 397 [1905]), Pennsylvania (Simpson v. Reed, 205 Pa. 53, 54 Atl. 499 [1903]), South Carolina (Carrigan v. Drake, 36 S. C. 354, 15 S. E. 339 [1892]), and Texas (Seay v. Cockrell, 102 Tex. 280, 115 S. W. 1160 [1909]). It exists in a modified form perhaps, in Nebraska. See Albin v. Parmele, 70 Neb. 740, 98 N. W. 29 (1904); *Id.*, 70 Neb. 746, 99 N. W. 646 (1904).

HARDAGE v. STROOPE.

(Supreme Court of Arkansas, 1893. 58 Ark. 303, 24 S. W. 490.)

Appeal from Circuit Court, Clark county; John E. Bradley, Special Judge.

Suit by W. S. Stroope against Joseph A. Hardage and others. From a decree for plaintiff, defendants appeal. Reversed.

BATTLE, J. J. L. Stroope and wife conveyed the land in controversy to Tennessee M. Carroll, "to have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this state." After this, Mrs. Carroll conveyed it in trust to James M. Hardage to secure the payment of a debt. She had two children born to her after the conveyance by J. L. Stroope and wife, but they died in her lifetime. She died leaving no heirs of her body, but left her father, W. S. Stroope, surviving. After her death the land was sold under the deed of trust, and was purchased by Joseph A. Hardage. W. S. Stroope, the appellee, now claims it as the heir of Mrs. Carroll, and Joseph A. Hardage, the appellant, claims it under his purchase.

The rights of the parties depend on the legal effect of the following words contained in the deed to Mrs. Carroll: "To have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this state." Appellee contends that Mrs. Carroll only took a life estate in the land under this clause, and that he is entitled to the remainder, she having left no descendants. On the other hand, the appellant contends that the remainder in fee vested in the children, and, when they died, Mrs. Carroll inherited it, and the whole estate in the land became vested in her; and that, if this contention be not true, the deed to Mrs. Carroll comes within the rule in *Shelley's Case*, and vested in her the estate in fee simple; and that in either event he is entitled to the land.

It is obvious that the deed to Mrs. Carroll created in her no estate in tail. Her grantor reserved no estate or interest, nor granted any remainder, after a certain line of heirs shall become extinct, but conveyed the land to her to hold during her life, and then to the heirs of her body in fee simple. No remainder vested in her children. It was to be inherited by the heirs of her body, and they were her descendants who survived her and were capable of inheriting at the time of her death. They might have been grandchildren. They were not the children, as they died in the lifetime of their mother.

The effect of the deed, as explained by the habendum, in the absence of the rule in *Shelley's Case*, was to convey the land to Mrs. Carroll for her life, and then to her lineal heirs, and, in default thereof, to her collateral heirs. As there can be collateral heirs only in the absence of the lineal, the deed conveyed the land to Mrs. Carroll, in legal phraseology, for her life, and after her death to her heirs.

Two questions now confront us: (1) Does the rule in *Shelley's Case* obtain in this state? (2) And, if so, does the deed in question fall within it?

1. Is it in force in this state?

Section 566 of *Mansfield's Digest* provides: "The common law of England, so far as the same is applicable and of a general nature and all statutes of the British parliament in aid of or to supply the defect of the common law made prior to the fourth year of James the First that are applicable to our own form of government of a general nature and not local to that kingdom, and not inconsistent with the constitution and laws of the United States or the constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the general assembly of this state."

The rule in *Shelley's Case*, as stated by Mr. Preston, which Chancellor Kent says is full and accurate, is as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." Its origin is enveloped in the mists of antiquity. It was laid down in *Shelley's Case* in the twenty-third year of the reign of Queen Elizabeth, upon the authority of a number of cases in the year books. Sir William Blackstone, in his opinion in *Perrin v. Blake*, 1 W. Bl. 672, cites a case in 18 Edw. II, as establishing the same rule. The earliest intelligible case on the subject, however, is that of *Provost of Beverly*, 3 Y. B. 9, which arose in the reign of Edward III., and substantially declared the rule as laid down in *Shelley's Case*.

Various reasons have been assigned for the origin of the rule. Chancellor Kent, upon this subject, says: "The judges in *Perrin v. Blake*, supra, imputed the origin of it to principles and policy deduced from feudal tenure, and that opinion has been generally followed in all the succeeding discussions. The feudal policy undoubtedly favored descents as much as possible. There were feudal burdens which attached to the heir when he took as heir by descent, from which he would have been exempted if he took the estate in the character of a purchaser. An estate of freehold in the ancestor attracted to him the estate imported by the limitation to his heirs; and it was

deemed a fraud upon the feudal fruits and incidents of wardship, marriage, and relief to give the property to the ancestor for his life only, and yet extend the enjoyment of it to his heirs, so as to enable them to take as purchasers, in the same manner, and to the same extent, precisely, as if they took by hereditary succession. The policy of the law will not permit this, and it accordingly gave the whole estate to the ancestor, so as to make it descendible from him in the regular line of descent. Mr. Justice Blackstone, in his argument in the exchequer chamber in *Perrin v. Blake*, does not admit that the rule took its rise merely from feudal principles, and he says he never met with a trace of any such suggestion in any feudal writer. He imputes its origin, growth, and establishment to the aversion that the common law had to the inheritance being in abeyance; and it was always deemed by the ancient law to be in abeyance during the pendency of a contingent remainder in fee or in tail. Another foundation of the rule, as he observes, was the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor, and thereby giving him the power of disposition. Mr. Hargrave, in his observations concerning the rule in *Shelley's Case*, considers the principle of it to rest on very enlarged foundations; and, though one object of it might be to prevent frauds upon the feudal law, another and a greater one was to preserve the marked distinctions between descent and purchase, and prevent title by descent from being stripped of its proper incidents, and disguised with the qualities and properties of a purchase. It would, by that invention, become a compound of descent and purchase,—an amphibious species of inheritance,—or a freehold with a perpetual succession to heirs, without the other properties of inheritance. In *Doe v. Laming*, 2 Burrows, 1100, Lord Mansfield considered the maxim to have been originally introduced, not only to save to the lord the fruits of his tenure, but likewise for the sake of specialty creditors. Had the limitation been construed a contingent remainder, the ancestor might have destroyed it for his own benefit; and, if he did not, the lord would have lost the fruits of his tenure, and the specialty creditors their debts."

But, whatever may have been the cause of its origin, its effect has been "to facilitate the alienation" of land "by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease." Its operation in this respect has commended it to the favorable consideration of the most learned and able men of Great Britain and the United States, and doubtless contributed to its preservation and continuance, and enabled it to survive the innovation of legislation and the changes and fluctuations of centuries. Based upon the broad principles of public policy and commercial convenience, which abhor the locking up and rendering inalienable any class of property,

it has ever been in harmony with the genius of the institutions of our country, and with the liberal and commercial spirit of the age. Hence, it has been recognized and enforced as a part of the common law of nearly every state where it has not been repealed by statute. *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011, 22 L. R. A. 598; *Baker v. Scott*, 62 Ill. 88; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814; *Doebler's Appeal*, 64 Pa. 9; *Kleppner v. Laverty*, 70 Pa. 72; *Polk v. Faris*, 9 Yerg. (Tenn.) 209, 30 Am. Dec. 400; *Crockett v. Robinson*, 46 N. H. 454; 4 Kent, Comm. marg. pp. 229-233; 2 Washb. Real Prop. (5th Ed.) pp. 655-657.

The rule has never been changed in this state except in one respect,—estates tail have been abolished. Section 643 of Mansfield's Digest provides that, whenever any one would become seised at common law "in fee tail of any lands or tenements by virtue of a devise, gift, grant or other conveyance, such person, instead of being or becoming seised thereof in fee tail, shall be adjudged to be and become seised thereof for his natural life only and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant or conveyance." To this extent it has been repealed; in other respects it remains in full force in this state; and it was so held in *Patty v. Goolsby*, 51 Ark. 71, 9 S. W. 846.

2. Does this case come within the rule?

"Whenever there is a limitation to a man which, if it stood alone, would convey to him a particular estate of freehold, followed by a limitation to his heirs * * * (or equivalent expressions) either immediately, or after the interposition of one or more particular estates, the apparent gift to the heirs, * * *" according to the rule in *Shelley's Case*, "is to be construed as a limitation of the estate of the ancestor, and not as a gift to his heirs." The theory was that, in cases which come within the rule, the heirs take by descent from the ancestor, and they cannot do so unless "the whole estate is united, and vests as an executed estate of inheritance in the ancestor." This theory was based upon the fact that "the ancestor was the sole ascertained and original attracting object,—the groundwork of the grantor's or testator's bounty,"—and upon the presumption, arising from the fact, that the grantor or testator, as the case may be, "meant the person who should take after the ancestor should be any person indiscriminately who should answer the description of heirs * * * of the ancestor, and be entitled only in respect of such description," and that the estate devised or conveyed should vest in them in that character only. "In order to effectuate this intent, and secure the succession to its intended objects," the rule rejects, as inconsistent and incompatible with this primary or paramount intent, "any other intent that the ancestor should take an estate for life only, and the heirs should take by purchase," and vests the estate of inheritance in the

ancestor. This was considered necessary to accomplish the primary object of the grantor or ancestor. 2 Fearn, Rem. pp. 216-220.

"Hargrave has justly observed," says Fearn on Remainders, "that the rule cannot be treated as a medium for discovering the testator's intention, but that the ordinary rules for the interpretation of deeds should be first resorted to; and that, when it is once settled that the donor or testator has used words of inheritance according to their legal import,—has applied them intentionally to comprise the whole line of heirs to the tenant for life; has made him the terminus by reference to whom the succession is to be regulated,—then the rule applies. But the rule is a means for effectuating the testator's primary and paramount intention, when previously discovered by the ordinary rules of interpretation,—a means of accomplishing that intention to comprise, by the use of the word 'heirs,' the whole line of heirs to the tenant for life, and to make him the terminus, by reference to whom the succession is to be regulated; and the way in which the rule operates, as a means of doing this, is by construing the word 'heirs' as a word of limitation, or, in other words, by construing the limitation to the heirs, general or special, as if it were a limitation to the ancestor himself and his heirs, general or special." 2 Fearn, Rem. p. 221.

In Doebl's Appeal, 64 Pa. 9, Judge Sharswood, in discussing the rule in Shelley's Case, said: "If the intention is ascertained that the heirs are to take qua heirs, they must take by descent, and the inheritance vest in the ancestor. The rule in Shelley's Case is never a means of discovering the intention. It is applicable only after that has been discovered. It is then an unbending rule of law, originally springing from the principle of the feudal system; and, though the original reason of it—the preservation of the rights of the lord to his relief, primer seisin, wardship, and marriage—has passed away, it is still maintained as a part of the system of real property which is based on feudalism, and as a rule of policy. It declares inexorably that, where the ancestor takes a preceding freehold by the same instrument, a remainder shall not be limited to the heirs, qua heirs, as purchasers. If given as an immediate remainder after the freehold, it shall vest as an executed estate of inheritance in the ancestor; if immediately after some other interposed estate, then it shall vest in him as a remainder. Wherever this is so it is not possible for the testator to prevent this legal consequence by any declaration, no matter how plain, of a contrary intention. This is a subordinate intent which is inconsistent with, and must therefore be sacrificed to, the paramount one. Even if he expressly provides that the rule shall not apply that the ancestor shall be tenant for life only, and impeachable for waste, if he interpose an estate in trustees to support contingent remainders, or as in this will, declare in so many words that he shall in no wise sell or alienate, as it is intended that he shall have a life interest only, it will be all ineffectual to prevent the operation of the

rule. No one can create what is in the intendment of the law an estate in fee, and deprive the tenant of those essential rights and privileges which the law annexes to it. He cannot make a new estate unknown to the law."

"The policy of the rule," says Chancellor Kent, "was that no person should be permitted to raise in another an estate which was essentially an estate of inheritance, and at the same time make the heirs of that person purchasers." 4 Kent, Comm. 216.

At common law the word "heirs" was necessary to convey a fee simple by deed. No equivalent words would answer the purpose. If the conveyance was not made to a man and his heirs, the grantee only took a life estate, notwithstanding the estate was limited by such phrases as "to A. forever," or "to A. and his successors," and the like. An express direction that the grantee should have the fee simple in the land would not have supplied the place of the word "heirs." But in this state the question as to what estate a deed to land conveys is determined by the intent of the parties, as ascertained from the contents of the deed and the power of the grantor to convey. When construed in this manner, it is obvious that the intention of the deed in question was to convey the land in controversy to Mrs. Carroll for life, then to her lineal heirs, and, in default thereof, to her collateral heirs; in other words, to Mrs. Carroll for life, and, after her decease, to her heirs. The intention that the heirs were to take only in the capacity of heirs is manifest. The deed comes within the rule in *Shelley's Case*. The estate of inheritance vested in Mrs. Carroll, and she became seised of the land in fee simple. 2 Washb. Real Prop. (5th Ed.) p. 653.

"As a consequence from the foregoing principles, whoever has a freehold which, by the terms of the limitation, is to go to his heirs, may alien the estate, subject only to such limitation as may have been created between his freehold and the inheritance limited to his heirs." 2 Washb. Real Prop. 651.

It follows, then, that Mrs. Carroll had the right to convey the fee in the land in trust to secure the payment of her debts, and that a sale of such estate under the deed, and in conformity with law, was valid.

The decree of the court below is reversed, and the cause is remanded for proceedings consistent with this opinion.⁷

⁷ The rule in *Shelley's Case* is abolished in Alabama (Code 1896, § 1025), California (Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049 [1894]), Connecticut (Leake v. Watson, 60 Conn. 498, 21 Atl. 1075 [1891]), Georgia (Smith v. Collins, 90 Ga. 411, 17 S. E. 1013 [1892]), Idaho (Wilson v. Linder, 18 Idaho, 438, 110 Pac. 274, 138 Am. St. Rep. 213 [1910]), Iowa (Daniels v. Dingman, 140 Iowa, 386, 118 N. W. 373 [1908]), Kentucky (Stephenson v. Hagan, 15 B. Mon. [Ky.] 282 [1854]), Maine (Plummer v. Hilton, 78 Me. 226, 3 Atl. 649 [1886]), Massachusetts (Sands v. Old Colony Trust Co., 195 Mass. 575, 81 N. E. 300, 12 Ann. Cas. 837 [1907]), Michigan (Fullagar v. Stockdale, 138 Mich. 363, 101 N. W. 576 [1904]), Minnesota (Whiting v. Whiting, 42 Minn. 548, 44 N. W. 1030 [1890]), Mississippi (Anno. Code 1892, § 2446), New York (Lytle v. Beveridge, 53 N. Y. 502 [1874]), Rhode Island (Nightingale v. Phillips, 23

IV. Future Estates—Under the Statute of Uses^a

1. SPRINGING USES

See *Proprietors of Church in Brattle Square v. Grant*, ante, p. 212.

2. SHIFTING USES

See *Proprietors of Church in Brattle Square v. Grant*, ante, p. 212.

V. Future Estates—Under the Statute of Wills (Executory Devices)^a

See *Proprietors of Church in Brattle Square v. Grant*, ante, p. 212.

RYAN v. MONAGHAN.

(Supreme Court of Tennessee, 1897. 99 Tenn. 338, 42 S. W. 144.)

Appeal from chancery court, Shelby county; Sneed, Chancellor.

Bill by Catherine Ryan and others against James P. Monaghan and others for the construction of a will. From a decree dismissing the bill, complainants appeal. Modified.

BEARD, J. James Monaghan died, leaving a will, which was duly probated. The seventh and eighth clauses of this will are as follows:

"Art. 7. To my beloved wife, Margaret, I give during her natural life all other real and personal property I may die seised and possessed of, to be used by her for her own separate use and benefit, without being controlled or interfered with under any circumstances by any one, except that she may pay fifty dollars each month to my son, James P., for his maintenance, provided it does not exceed one-third of the income of the estate.

R. I. 175, 72 Atl. 220 [1908]), Tennessee (*Teague v. Sowder*, 121 Tenn. 132, 114 S. W. 484 [1908]), Virginia (*Walker v. Lewis*, 90 Va. 578, 19 S. E. 258 [1894]), West Virginia (*Irvin v. Stover*, 67 W. Va. 356, 67 S. E. 1119 [1910]), and Wisconsin (*Jones v. Jones*, 66 Wis. 310, 28 N. W. 177, 57 Am. Rep. 266 [1886]). It is abolished as to wills in Kansas (Gen. St. 1909, § 9829), New Hampshire (*Sanborn v. Sanborn*, 62 N. H. 631 [1882]), New Jersey (*Quick v. Quick*, 21 N. J. Eq. 13 [1870]), and Ohio (*McDaniel v. Hays*, 74 Ohio St. 515, 78 N. E. 1131 [1906]). And see *Godman v. Simmons*, reported post, p. 351, in this book.

^a For discussion of principles, see *Burdick*, Real Prop. §§ 150-153.

^a For discussion of principles, see *Burdick*, Real Prop. § 154.

"Art. 8. At the death of my wife, I direct, will, and bequeath to the heirs of my son, James P. Monaghan, all of the real estate which I died seised and possessed of, to be for their use and benefit, under the direction of the probate court of Shelby county, Tennessee, provided, however, in the event my son, James P. Monaghan, shall die without issue, and unmarried, then, and in that event, all of said real estate I died possessed of, except the property described, No. 23 Alabama street, shall be owned, and is hereby given to, my three brothers and one sister, share and share alike, divided equally among them or their heirs. The realty I now possess consists of three hundred and fifteen feet on the west side of Alabama street, extending back to the bayou; a house and lot on the south side of Robeson street; three acres on Breedlove avenue, outside of the city of Memphis; and an irregular piece of land on Winchester street in Memphis."

The testator left surviving him his wife, Margaret, and James P. Monaghan, his only child and heir at law, who was at the death of testator, and continues to be, an unmarried man. The life tenant having subsequently died, this bill was filed by the brothers and the sister of the testator, asking primarily for a construction of the eighth clause of the will, and alleging that upon a proper interpretation of it James P. Monaghan, the son, is without interest in the property covered by this clause; and that, as the life estate has fallen in, they are entitled to be let into its possession and enjoyment as owners in fee.

There is no doubt of the intention of the testator as it is expressed in clause or article 7 of the will. He intended that his wife, Margaret, should take a life estate in all his real and personal property, save the lot named in his eighth clause as No. 23 Alabama street, which he had disposed of in an earlier article of his will. For some reason, undisclosed in the record, the father made no provision for his son taking an interest in his realty. He did not disinherit him, but he simply failed to provide for him, so far as his real estate was concerned. While omitting to make provision for him in this respect, he did not disregard his heirs, but devised to them, on the falling in of the life estate, all of the realty which, by the preceding article, had been given to the wife for the term of her natural life. This estate thus devised to the "heirs of" the son was a contingent remainder; and as this son was then alive, and as *nemo est hæres viventis*, this remainder estate, not being able to take effect on the termination of the particular or supporting estate, fell to the ground. In the meantime, where rests the inheritance of this property? In whom is it lodged? It is evident that it is not in these complainants, for their interest, if any they have, rests on the contingency of James P. Monaghan dying "without issue and unmarried." This contingency may never happen. He may marry, and then die leaving issue. If so, these complainants will be disappointed of all interest under this clause. By accident or design the testator failed to dispose of the inheritance, and by operation of law it passed to his son and only

heir, James P. Monaghan. *Clopton v. Clopton*, 2 Heisk. 31; *Bigley v. Watson*, 98 Tenn. 353, 39 S. W. 525, 38 L. R. A. 679.

The next question is, does this inheritance exist in the son absolutely, or is it in the nature of a fee determinable on his dying "without issue, and unmarried"? This depends upon whether, under the clause in question, the complainants are contingent remainder-men or executory devisees. If the former, then, as there is no particular estate to support their remainder estate, it must fail. If, however, the interest is that of executory devisees, then, as such, an interest may be created to come into existence in futuro, and does not need the aid of a supporting estate; then it can be saved to them. We think it clearly is the latter.

"An executory devise," says Mr. Jarman, "is a limitation by will of a future estate or interest in land which cannot, consistently with the rules of law, take effect as a remainder for it is well settled (and, indeed, has been remarked as a rule without an exception) that, where a devise is capable, according to the state of the objects at the death of the testator, of taking effect as a remainder, it shall not be construed to be an executory devise. * * * A remainder may be described to be an estate which is so limited as to be immediately expectant on the natural determination of a particular estate of freehold limited by the same instrument. It follows that every devise of a future interest which is not preceded by an estate of freehold created by the same will, * * * or which, being so preceded, is limited to take effect before or after, and not at the expiration of, such prior estate of freehold, is an executory devise." 2 *Jarm. Wills*, 483.

The complainants, and those of the defendants who are the children and heirs of a dead brother of the testator, have an interest falling within the definition of an executory devise as given by Mr. Jarman. To this extent, and alone for the purpose of determining this interest, was this bill maintainable. In all other respects the chancellor was right in his decree of dismissal. The costs of this court and the court below will be borne by complainants.

GLOVER v. CONDELL.

(Supreme Court of Illinois, 1896. 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360.)

Appeal from appellate court, Third district.

Action in equity by Mary J. Glover and others against Moses B. Condell and others. From a decree of the appellate court (56 Ill. App. 107), reversing that of the circuit court, plaintiffs appeal. Reversed. * * *¹⁰

The material facts, as set up in the pleadings and as established by the proofs, are substantially as follows: Thomas Condell died on

¹⁰ Part of the statement of facts is omitted.

October 11, 1880, in Lyon county, Kan., leaving a will, dated December 23, 1865, and a codicil thereto, dated August 19, 1867.

The will is as follows:

"I, Thomas Condell, of Sangamon county, in the state of Illinois, do make and ordain this, my last will and testament, in manner following, to wit:

"First. I devise to my wife, Elizabeth H. Condell, so much of my household and kitchen furniture and provisions as she may think fit to retain for her own use.

"Secondly. I direct that my executors, hereinafter named, shall sell all the rest of my estate, real and personal, which I may leave at my death, except my homestead, on such terms as they may deem advisable; and they are also authorized to sell my homestead, with the consent of my wife, Elizabeth H. Condell, and to make all necessary and proper conveyances of such real estate as they may sell.

"Thirdly. Out of the first proceeds of my estate my executors are to pay to my wife, Elizabeth H. Condell, such an amount as will, with the amount charged to her in the account attached to this will, make up the sum of five thousand dollars, to be at her absolute disposal.

"Fourthly. All the remainder of the proceeds of my estate, including cash on hand, debts due to me, stocks, or bonds, to which shall be added all the advances I have heretofore made to each one of my children or shall hereafter make from time to time, as the same are or hereafter may be charged and set forth in the account attached to this will, which account will be charged in my own handwriting, and the sum of my estate then on hand, composed of all advances made to my children, debts due to me by my children for money loaned them, debts due to me by other persons, stocks, bonds, etc. (except the specific sum devised to my wife), shall then be divided into six equal parts,—one part for the use of my wife, and one part for the use of each of my children, Moses B. Condell, Mary Jane Glover, Thomas E. Condell, Emily Montgomery, and Albert B. Condell, to be disposed of as hereinafter directed. * * *

"(f) The part devised to my son Albert B. Condell is to be kept by my executors entire at interest or invested until he shall arrive at legal age, and so much of the interest or dividends as may be necessary to his support and to give him a good education shall be applied to that purpose by my executors; and when he shall arrive at lawful age he is to receive one-third of his sixth part, and the other two-thirds of the sixth part devised to him is to be held by my executors as trustees, and in trust for him, and is to be loaned out on good security, or kept invested in stocks, and the interest or dividends is to be paid to him as the same accrues and is received during his natural life, and after his death the principal of his share or part is to be paid to his heirs.

"(g) If, by misfortune, affliction, or otherwise, any of my children should not make a proper use of the income to be derived from their trust fund, my executors and trustees are hereby directed and authoriz-

ed to use said income in such a manner as will insure to them the necessities of life and to keep them from want. In the event of the death of any of my children without the living heirs of their bodies, their share of my estate shall be added to the sum held in trust for the benefit of my wife, Elizabeth H. Condell, during her natural life, and after her death the same shall be divided amongst my children in the same manner as is provided for the distribution of her share.
* * *

The testator's wife, Elizabeth H. Condell, died intestate in his lifetime, to wit, on December 5, 1876. He left no widow, but five children, namely, Moses B. Condell, Mary J. Glover, Thomas E. Condell, Emily Montgomery, and Albert B. Condell (the latter since deceased), his heirs and legatees under his will. * * *

MAGRUDER, C. J.¹¹ * * * After these preliminary explanations, the provision of the will in regard to the disposition of the fund in controversy, which represents two-thirds of the sixth part devised by the testator to Albert, is substantially and in brief as follows: The executors, as trustees, are to hold said two-thirds in trust for Albert, and lend it out or invest it, and pay him the interest or dividends therefrom during his life, and, after his death, pay the principal thereof to his heirs; but, in the event of his death without living heirs of his body, the same is to be divided among the children of the testator in such proportions as their circumstances may require to keep them from want, or to furnish them with the necessities of life for themselves and children.

The question again recurs: What interest in the two-thirds of Albert's share did this provision of the will give to the children of the testator after the death of Albert without living heirs of his body? Leaving, for the present, the consideration of the original gift, it cannot be said that there are any words in the gift over which import an indefinite failure of issue, or contravene the rule against perpetuities. The language of the gift over is that, "in the event of the death of any of my children without living heirs of their body," etc. The words "without living heirs of their body" import a definite failure of issue, and the language used refers to the death of any one of the children of the testator without heirs of his body, or issue, living at the time of his death. *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029. Where the limitation over is upon the first taker "dying without issue living," the will means issue living at the death of the first taker, and the limitation over is not too remote, but is good as an executory devise. 4 Kent, Comm. (12th Ed.) marg. p. 277. Where the bequest is of personal property, slight circumstances and other expressions in the will will be laid hold of as indications of an intention that a limitation over on death without issue shall take effect at a definite time, to wit, at the

¹¹ Part of the opinion is omitted.

death of the first taker. *Bedford's Appeal*, 40 Pa. 18; *Ladd v. Harvey*, 21 N. H. 514; 4 Kent, Comm. (12th Ed.) marg. p. 282.

The construction of the words of the gift over in the case at bar as importing a definite failure of issue is supported, not only by the use of the qualifying word "living," but also by the fact that the share of any one of the children dying without living heirs of his body is to be divided among the remaining children of the testator. These children are mentioned by name in the will, and belong to the same class as the first taker, and must be regarded as his survivors, or persons in being at the time of his death. As was said by Mr. Justice Strong, in *Bedford's Appeal*, supra: "It has often been held that a limitation over, by will, to survivors, or persons in being, after the death of the first taker without issue, raises a strong presumption that the testator did not contemplate an indefinite failure of issue." A gift over upon a definite failure of issue does not alter the construction of the preceding limitation, but ingrafts upon it an executory devise, to operate upon the happening of the event specified. 11 Am. & Eng. Enc. Law, p. 924. As applied to land, an executory devise is "such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law." 2 Washb. Real Prop. (5th Ed.) marg. p. 341. One species of executory devise, as applied to lands, is "where a fee simple is devised to one, but is to determine upon some future event, and the estate thereupon to go over to another." *Id.* p. 344. Or, stated more generally, one species of executory devise relative to real estate is "where the deviser parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate on that contingency." 4 Kent, Comm. marg. p. 268. Limitations over upon the death of the first taker without issue are construed as executory devises on definite failure of issue after an estate in fee simple. 2 Jarm. Wills (Rand. & T. 5th Am. Ed.) p. 485. Thus, a devise to A. and his heirs, with a gift to B. in case A. dies without issue surviving him at the time of his death, gives B. an executory devise. 20 Am. & Eng. Enc. Law, p. 920, and cases cited in note 1.

Substantially the same rule applies to personal property. It has been said that all future interests in personalty, whether vested or contingent, and whether preceded by a prior interest or not, are in their nature executory, and fall under the rules by which that species of limitation is regulated. 20 Am. & Eng. Enc. Law, p. 930. Preston divides executory limitations of personalty into three kinds, and says that the second sort is where there is a complete disposition of the property, and there is a substitution of another person to take in some event which is to defeat or abridge the former gift. 2 Prest. Abst. 142, 143; 20 Am. & Eng. Enc. Law, p. 936. Here, the original disposition of the two-thirds part of Albert's share was that it should be held in trust by the trustees, and invested, and the interest or dividends paid to him during his life, and after his death the principal of his share was to be

paid to his heirs. It is a general rule that, where there is a gift of personalty to A. and his heirs, A. will take the absolute interest. Strictly, the words "heirs" and "heirs of his body" are inapplicable to personal property. Whereas real estate is conveyed to a man, his heirs and assigns, personal property is assigned to him, his executors, administrators, and assigns. So, where there is a gift to A. and his representatives, A. will take the absolute property. So, also, a gift to A. for life, and then to his personal representatives, will give A. the absolute property. Williams, Pers. Prop. marg. pp. 242, 243; Theob. Wills (2d Ed.) p. 371; 29 Am. & Eng. Enc. Law, pp. 436, 437.

This rule applies where the personal property is in the hands of trustees. "Thus, if money or stock be settled in trust for A. for life, and after his decease in trust for his executors, administrators, and assigns, A. will be simply entitled absolutely, in the same manner as a gift of lands to A. for his life, with remainder to his heirs and assigns, gives him an estate in fee simple." Williams, Pers. Prop. marg. p. 244. This is an application by analogy of the rule in Shelley's Case to personal property. 22 Am. & Eng. Enc. Law, p. 512, and cases cited in note 3. Though, strictly speaking, this rule has reference to real estate only, yet it is often applied to grants of personalty by way of analogy, for the purposes of construction, and when so applied yields more readily to the apparent intention of the testator than it does in grants of realty. Taylor v. Lindsay, 14 R. I. 518; Williams, Pers. Prop. marg. p. 244; Horne v. Lyeth, 4 Har. & J. (Md.) 431. The rule in Shelley's Case applies to equitable as well as legal estates, but requires that both estates (the prior estate limited to the ancestor, and the subsequent estate limited to the heirs) shall be of the same quality (that is, both legal, or both equitable), because, if the prior estate is an equitable or trust estate, and the subsequent estate is a legal one, the two do not unite as an estate of inheritance in the ancestor. 4 Kent, Comm. marg. pp. 210, 211. Thus, if the legal estate is given to A. in trust for B. for life, and the legal remainder to the heirs of B. at his death, the rule cannot apply, as the legal and equitable estates cannot so coalesce as to give B. either a legal or equitable fee. 1 Perry, Trusts (3d Ed.) § 358. So, also, if the trustee holding the property for A. for life has active duties to perform, but at the death of A. the trust for the heirs is merely passive, the statute will execute the use, so that the estate of the heirs is a legal one, while the prior estate is equitable. 22 Am. & Eng. Enc. Law, p. 509, and cases in note 4.

But personal property is not within the statute of uses. In the case at bar, the trustees were to hold the proceeds of sale—the money or securities representing two-thirds of Albert's share—during his life, and invest the same, and pay him the interest during his life; so that the trust was an active one, and his estate was equitable. At his death the principal of the share is to be paid to his heirs, and so, for the purpose of turning the share over to the heirs by payment, or delivery, or assignment of securities, the legal title at his death still remained in

the trustees, and, until such payment, delivery, or assignment, the estate of the heirs was equitable. In such cases the legal title remains in the trustee "until the purposes of the trust are accomplished, and until the possession of the property is in some way transferred to the person entitled to the use, or the last use." 1 Perry, Trusts (3d Ed.) 303, 311; *Kirkland v. Cox*, 94 Ill. 400. If, therefore, in this case, the original devise to the trustees of the fund to be invested for Albert during his life, and to be paid to his heirs at his death, considered separately from the gift over to the children of the testator, be construed by the application thereto of the principles involved in *Shelley's Case*, it cannot be said that the prior estate (given for life to Albert) and the subsequent estate (to go to his heirs) are not both of the same quality.

But, whether the rule in *Shelley's Case* be applied by analogy to the original devise or bequest herein mentioned, or whether it be regarded as a gift to Albert and his heirs, in either case he thereby took the ownership of the fund, subject to the limitation over thereof to the children of the testator, upon the contingency of his death without living heirs of his body at the time of his death. At common law there could be no limitation over of a chattel, so that, where a chattel or other personal property was given to one for life, with a limitation over to another, the former took the absolute title, and the limitation over was void, both at law and in equity; but in the course of time equity has established the doctrine that, where there is a gift of personal property to one for life, with a limitation over to another, such limitation is good as an executory devise. *Welsch v. Bank*, 94 Ill. 191; 2 Kent, Comm. marg. p. 352; 1 Schouler, Pers. Prop. § 138.

Cases which hold that, where there is a gift of personal property to A. and his heirs, A. takes the property absolutely, and there can be no limitation over in the event of his dying without issue, will be found, upon examination, to be cases where the words used import an indefinite failure of issue. Thus, in *Albee v. Carpenter*, 12 Cush. (Mass.) 382, it was held that a devise to A. and his heirs of the residue of the testator's property, "and if said A. die without issue or heirs," remainder over to others, gave A. an estate tail by implication; and that any words in a devise of real estate which would give an estate tail to the first taker, with or without a remainder over, would, in a bequest of personal property, give the first taker an absolute estate, and the remainder over would be void. But the holding was placed upon the ground that the gift over was upon a general failure of issue, and for that reason made the estate an estate tail in the first taker, and it was there said by Chief Justice Shaw: "If she has no issue living at the time of her decease may be a contingency the happening of which may give effect to a bequest over as an executory devise, because it must vest at her decease, and therefore has no greater effect than a gift for life."

So, in the case at bar, the words of the gift over have been construed to mean, in substance, that if Albert shall die without heirs of his body living at the time of his death, the fund shall be divided among the testator's children, and therefore effect will be given to the gift or bequest over as an executory devise. "Limitations over in chattels have been supported like limitations of real property very generally. *Holms v. Williams*, 1 Root, 332, and many other cases. In many of the foregoing cases, limitations of personal property over upon failure of issue of the first taker have been held good, as limited upon a definite failure of issue." 3 Jarm. Wills (Rand. & T. 5th Am. Ed.) p. 374, note 1. In *Theob. Wills* (2d Ed.) p. 371, after stating the doctrine that a bequest of personalty to a man and his heirs would no doubt pass the absolute interest, the author says: "Of course, if, in wills, * * * the gift over upon failure of issue can be limited to failure of issue at the death of the tenant for life, a prior gift to A. and the heirs of his body gives A. an interest, defeasible upon failure of issue at his death." Here Albert took an absolute interest in the fund, defeasible upon failure of living heirs of his body at his death. And this is so notwithstanding the fund was in the hands of trustees. * * *

This court has held in a number of cases that, although a fee cannot be limited upon a fee by deed, yet it can be so limited by will by way of executory devise. *Ackless v. Seekright*, Breese, 76; *Siegwald v. Siegwald*, 37 Ill. 430; *McCampbell v. Mason*, 151 Ill. 500, 38 N. E. 672; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Palmer v. Cook*, 159 Ill. 300, 42 N. E. 796, 50 Am. St. Rep. 165. The case of *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325, so far as it holds to the contrary, is overruled. The language used in *Silva v. Hopkinson*, 158 Ill. 386, 41 N. E. 1013, should be construed as applicable only to the facts of that case, and not as contravening the doctrine of *Siegwald v. Siegwald*, *supra*, and the other cases of a like character above referred to. If a fee can be limited upon a fee by way of executory devise as to real estate, there is no reason why, in case of a gift of personal property to one person, there cannot be a limitation over of such property by way of executory devise to other persons, especially where, as here, the latter belong to the same class as the first taker, provided, always, such limitation over does not contravene the rule against perpetuities; that is to say, provided it is to take effect upon a definite failure of issue. Indeed, Mr. Gray, in his work on the Rule against Perpetuities, says, at the close of the chapter on "Future Interests in Real Estate and Personal Property" (section 98): "The result of the investigation pursued in the present chapter is this: Originally, the creation of future interests at law was greatly restricted, but now, either by the statute of uses and wills, or by modern legislation, or by the gradual action of the courts, all restraints on the creation of future interests, except those arising from remoteness, have been done away."

From what has been said, it follows that, Albert having taken an ab-

solute interest in the fund in question, determinable in the event of his death, and having died without living heirs of his body at the time of his death, the fund is to be divided among the surviving children of the testator, to wit, Mary J. Clover, Emily Montgomery, Thomas E. Condell, and Moses B. Condell, in such proportions as their circumstances may require to keep them from want, or to furnish them with the necessities of life for themselves and their children, and that the appellee, Moses B. Condell, is entitled to participate in that division, unless the interest to come to him upon such division has been released by the quitclaim deed executed by him. The interest of appellee in the share of his brother Albert had not accrued when the quitclaim was executed. It was, then, a future contingent interest, which might never ripen into possession. It was limited to take effect upon a contingency which might never happen, to wit, upon the death of Albert without living heirs of his body. By an executory devise no estate vests upon the death of the testator, but only on some future contingency. *Bristol v. Atwater*, 50 Conn. 402; *Griswold v. Greer*, 18 Ga. 545.

We do not deem it necessary to discuss the question whether such a contingent executory interest is assignable in equity or not. For the purposes of the present case it may be admitted that such an interest is assignable. If the instrument of release executed by appellee purported to release a future interest of any kind, then the question of the assignability of the interest in question would be presented. But the release is an ordinary quitclaim of all the "claim, right, title, and interest," etc., of appellee and his wife, and contains no covenants of warranty. It is well settled that such an interest does not pass a subsequently acquired interest. *Holbrook v. Debo*, 99 Ill. 372. "A conveyance of all the right, title, and interest in lands is certainly sufficient to pass the land itself, if the party conveying has an estate therein at the time of the conveyance, but it passes no estate which is not then possessed by the party." *Blanchard v. Brooks*, 12 Pick. (Mass.) 47. A quitclaim is sufficient to pass any estate which the person executing it has at the time of such execution, but it cannot affect by way of release a future contingent interest limited to the surviving members of a class upon the event of the death of one of them without living issue at the time of his death, there being no terms used in such quitclaim or release which can be construed as referring to future interests. *Striker v. Mott*, 28 N. Y. 82.

In order to create an assignment of future interests and contingencies, "there must be, on the face of the instrument expressly, or collected from its provisions by necessary implication, language of present transfer, directly applying to the future as well as to the existing property, or else language importing a present contract or agreement taken between the parties to sell or assign the future property." 3 Pom. Eq. Jur. § 1290. Here the quitclaim does not amount to a release of future interests. While, therefore, the instrument of release

executed by Moses B. Condell has the effect of passing all his interest in the share specifically set off to him or for his use in his father's estate, yet it did not have the effect of passing the future contingent interest in his brother Albert's share limited over to him so as to take effect only in the uncertain event of Albert's death without living heirs of his body. * * *

Reversed and remanded.

VI. Alienation of Future Estates ¹²

GODMAN v. SIMMONS.

(Supreme Court of Missouri, Division No. 1, 1892. 113 Mo. 122, 20 S. W. 972.)

Appeal from circuit court, Saline county; Richard Field, Judge.

Ejectment by William C. Godman and others against Henry C. Simmons and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

BRACE, J. This is an action in ejectment, in which the plaintiffs seek to recover an undivided three fourths of a tract of land in Saline county. The answer admitted possession, and denied all the other material allegations of the petition. The case was tried before the court without a jury, the judgment was for the defendants, and the plaintiffs appeal.

Elizabeth O'Bannon is the common source of title. On the 26th day of October, 1868, she and her husband duly executed, acknowledged, and delivered a warranty deed conveying the premises to Mary R. Godman "for and during her natural life, and with remainder to the heirs of her body. * * * To have and to hold the premises hereby conveyed with all the rights, privileges, and appurtenances thereto belonging, or in any wise appertaining, unto the said Mary R. Godman during her natural life, and then to the heirs of her body and assigns forever." The plaintiffs, William C. Godman, Josephine C. Way, and Mattie B. Naylor, are the children of the said Mary R. Godman, who died in March 1888. Besides the plaintiffs, the said Mary R. Godman had three other children,—Burton L. Godman, who died in 1876; Mollie, who intermarried with one Emmerson, and afterwards died in February, 1880, leaving one child, Edward, surviving her; and Beal Godman, who died in September, 1888, without lineal descendants.

The plaintiffs, after showing these facts, rested, and the defendants, upon their part, introduced in evidence a deed of trust executed by Melvin Godman and the said Mary R. Godman, his wife, the said William C. Godman and wife, John B. Way and the said Josephine C. Way, his wife, and the said Burton L. Godman and Mollie Godman, to Samuel Boyd, trustee, to secure the payment of a promissory note to

¹² For discussion of principles, see Burdick, Real Prop. § 158.

one George Farlow for \$1,300, due one year after date, with power of sale upon default in payment of the debt at maturity. This deed was dated April 4, 1876. The defendants also offered the note, secured by said deed of trust, which is signed by all of the grantors therein. The defendants next offered a deed from Samuel Boyd, trustee, to Henry Emmerson, dated October 10, 1877. This deed was made in pursuance of a sale under the power contained in the foregoing deed of trust. The defendants next offered a deed dated October 19, 1878, containing covenants of general warranty, from Henry Emmerson and wife to defendant Henry C. Simmons, and then a deed dated January 27, 1880, from Henry C. Simmons and wife to Melvin Godman. Next a deed of trust of same date from Melvin Godman and wife to W. R. Gist, trustee, to secure an indebtedness due to said H. C. Simmons, and a deed from Gist, trustee, under the power of sale contained in said deed of trust, to Henry C. Simmons, dated September 1, 1886. The defendants next offered a deed dated April 3, 1880, from Beal Godman to Melvin Godman, and deed dated May 23, 1881, from Mattie B. Naylor and husband, conveying her undivided interest in the land to Melvin Godman.

The plaintiffs objected to the introduction of each of the foregoing deeds on the ground that same "was incompetent, irrelevant, and immaterial," and the objection in each instance was overruled by the court. They also asked declarations of law in effect excluding said deeds, and declaring that the plaintiffs had the title to the land sued for, which instructions or declarations of law the court refused to give, and plaintiffs excepted.

1. It is provided by the statute of this state that "when a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heir, or heirs of the body, of such tenant for life, shall be entitled to take as purchasers in fee simple, by virtue of the remainder so limited to them." Rev. St. 1889, § 8838; Gen. St. 1865, p. 442, § 6. The deed of Elizabeth O'Bannon came before us for construction in the recent case of *Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. 979, and we there held "that the statute just quoted converted the estate tail created by the deed at common law into a life estate in the first taker, with a contingent remainder in fee simple in favor of those persons who should answer the description of heirs of her body;" and as no one can be the heir of a living person, it could not be told who the heirs of the body of Mary R. Godman would be until her death, when the contingent remainder in fee under the deed would vest; and that Mrs. Emmerson, not being alive at that time, took no estate under the deed of Mrs. O'Bannon, and conveyed none by the deed of trust to Boyd, made in her lifetime before the death of Mrs. Godman. In her case she had no vested estate at the time the deed was made, and no estate ever vested afterwards.

Now, while the plaintiffs and Beal Godman were in the same relation

to the title to the premises as Mrs. Emmerson at the time they made their deeds, they survived their mother, and their remainder contingent during the lifetime of the mother became a vested estate at her death; and the main question in the case is, did this estate pass by their deeds? The deed of trust executed by plaintiffs William C. Godman and Josephine C. Way purported to convey to Boyd, trustee, the premises in fee simple, and contained the statutory covenants implied by the use of the words "grant, bargain, and sell." The deed of the plaintiff Mattie B. Naylor and husband purported to "grant, bargain, and sell" all their interest in the premises to Melvin Godman. In the language of the deed: "The interest hereby intended to be conveyed is the entire interest of Mattie B. Naylor in the above-described lands as one of the daughters of Mary R. Godman, whether present or prospective, vested or contingent, and especially any remainder she may now have, or hereafter be entitled to, in said lands under a certain deed made by M. W. O'Bannon and wife to said Mary R. Godman, of date October 26, 1868." The deed of Beal Godman, as party of the first part, purported to "remit, release, and forever quitclaim" unto the said Melvin Godman, party of the second part, "all of his right, title, interest, and estate in expectancy in and to" the premises to have and to hold the same, "so that neither said party of the first part, nor his heirs, nor any other person or persons for him or in his name or behalf, shall or will claim or demand any right or title in the aforesaid premises, or any part thereof, but they and every one of them shall by these presents be excluded and forever barred."

At the time these deeds were made the plaintiffs, William C. Godman, Josephine C. Way, and Mattie B. Naylor, and their brother Beal Godman, each had an interest in this real estate. The estate they were to have, however, was contingent upon the death of their mother and their surviving her. The first event was sure to happen, and they were sure to take if they did survive her; but whether they would survive her, and thus become heirs of her body, was uncertain, and hence the interest they had was no more than a contingent remainder, and a contingent remainder of that class that grows out of the uncertainty of the persons to take at the determination of the life estate. Such an interest was not alienable at common law before the contingency happened. 2 Washb. Real Prop. (5th Ed.) p. 264, § 6; Tied. Real Prop. (2d Ed.) § 411; 6 Amer. & Eng. Enc. Law, p. 900. This rule of the common law seems to have been abolished in England by 8 & 9 Vict. c. 106, § 6, providing that "after the first day of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed," and by statute in

New York, Michigan, Minnesota, and Wisconsin, making all expectant estates alienable in the same manner as estates in possession. 2 Washb. Real Prop. p. 267, § 5.

In this state, while we have no similar express statute, our statutes do provide that "conveyances of lands, or of any estate or interest therein, may be made by deed," (Rev. St. 1889, § 2395;) that all estates and interests in land are subject to be seised and sold under execution, (Id. §§ 4915, 4917;) and that any person having an interest in real estate, whether the same be present or future, vested or contingent, can come into partition for the disposal of such interest, (Id. §§ 7136, 7137.) *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802. This rule of the common law seems to be inconsistent with the general scope of our statutes regulating the disposal of real estate, and not in harmony with the genius and spirit of our institutions, which brook no restraint upon the power of the citizen to alienate any of his property. We are pre-eminently a trading and commercial people; our lands are our greatest stock in trade, and the whole tendency of our laws is to encourage and not restrain their alienation. The spirit and genius of the feudal system and the common law was exactly the reverse; and we do not think this now almost obsolete common-law rule ought to obtain in this state.

The point in question, so far as we are advised, has never been passed upon directly in our appellate courts; but the St. Louis court of appeals had occasion to consider this rule in *Lackland v. Nevins*, 3 Mo. App. 335, and that court, speaking through Judge Bakewell, said of it: "The doctrine that contingent interests in real estate cannot be conveyed by law remained as one of the last relics of a system of which the policy was to hinder the alienation of land. It is now done away with in England by statute. It is contrary to the policy of our system, and our statute of conveyances, which says that 'conveyances of land, or of any estate or interest therein, may be made by deed executed,' " etc. A contingent remainder is not an estate in lands, since it is merely the chance of having, but it is an interest in land, and one which long remained inalienable, simply because it had never been thought worth legislating about; so that, as Williams says, (*Williams*, Real Prop. 257,) "the circumstance of a contingent remainder, having been so long inalienable at law, was a curious relic of the ancient feudal system." Our statute is careful to make alienable by deed, not only estates, but also interests in land, which covers the case of executory devises and contingent remainders as fully as if they were named.

In *White v. McPheeters*, 75 Mo. 286, this court seemed to entertain no doubt that under our statute in regard to executions, which declares that the term "real estate" as therein used "shall be construed to include all estate and interest in lands, tenements, and hereditaments," the sale of a remainder under execution, whether it be regarded as vested or contingent, was authorized. It would be remarkable, indeed,

if it were the law that a citizen had something which by the law of the land he could not sell and transfer himself, but which the sheriff, under execution, could sell and transfer for him. This ancient common-law rule that contingent remainders are inalienable, like the rule that choses in action are not assignable, does not obtain in this state, not because there has been a positive statute abolishing these rules, but because they are out of harmony with its general affirmative statute upon these subjects, and long since have ceased, if they ever did exist, as rules governing the action of its citizens in the business relations of life.

If, then, the contingent interests of the said three plaintiffs and of the said Beal Godman in the premises were the subject of grant by deed duly executed in accordance with the requirements of our laws, the effect of these conveyances was to transfer to the grantees such interests, with all their incidents, to hold in the same right and to the same extent as they were held by the grantors before being conveyed,—the grantees were thereby put in their shoes. If the grantors died before the termination of the life estate, the grantees took nothing. If they survived their mother, the grantees took just what the grantors would have taken if the conveyances had not been made. There can be no doubt that such was the intention of the parties, and such ought to be, and we believe is, the effect of these conveyances under the laws of this state. This being so, the defendant, by a regular chain of conveyances, having acquired the title of the grantees in these deeds to the premises, the judgment of the circuit court was for the right party. There was some evidence pro and con upon the question of the delivery of the deed from Beal Godman.

It is evident from the instructions and finding that the court must have found this question of fact for the defendants, and, as there was evidence tending to support that finding, its judgment thereon is final. The judgment is affirmed. All concur.¹⁸

¹⁸ In accord with the preceding case, at least to the effect that contingent remainders are alienable under statutes providing that any estate or interest in real property may be conveyed, see *McDonald v. Bank*, 123 Iowa, 413, 98 N. W. 1025 (1904); *Sheirick v. Maxwell*, 89 S. W. 4, 28 Ky. Law Rep. 173 (1905); *Summet v. Realty, etc., Co.*, 208 Mo. 501, 106 S. W. 614 (1907); *Brown v. Fulkerson*, 125 Mo. 400, 28 S. W. 632 (1894); *Young v. Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642 (1893). Some statutes expressly provide that "expectant estates" may be aliened, and it is also held that under such statutes a contingent remainder may be conveyed. See *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744, 63 Am. St. Rep. 584 (1896); *Lauter v. Hirsch*, 67 Misc. Rep. 165, 121 N. Y. Supp. 651 (1910); *Griffin v. Shepard*, 124 N. Y. 70, 26 N. E. 339 (1891). In *Whelen v. Phillips*, 151 Pa. 312, 332, 25 Atl. 44 (1892), the court says: "Without inquiring as to the present status of the law elsewhere, it may be confidently asserted that in this state a person, sui juris, owning a contingent remainder in land, may sell the same." However in a prior decision of the same court, *Stewart v. Neely*, 139 Pa. 309, 316, 20 Atl. 1002 (1891), the court said: "A contingent remainder can only be conveyed by devise; a deed purporting to convey it operates only as an estoppel, unless the conveyance is after the contingency happens." Some of the modern cases distinguish between the uncertainty of the person who is to take and

THE RULE AGAINST PERPETUITIES

I. The Rule Stated¹

1. IN GENERAL

Appeal of APPLETON.

(Supreme Court of Pennsylvania, 1890. 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925.)

Appeal from orphans' court, Philadelphia county.

CLARK, J. John Lawrence died domiciled in the city of Philadelphia, in the month of March, 1847. By his last will and testament he devised all his real and personal estate to certain persons therein named in trust, to pay over the net income, during her life-time, to his daughter, Ann Appleton; to assign the real estate upon her decease in fee to the appointees of her last will; or, failing such appointment, to pay over the same to and among her then living children, and the issue of children then deceased. The trustees named in the will were removed by the orphans' court of Philadelphia county, during the life-time of Ann Appleton, and George W. Appleton and Henry Pomereene were duly appointed trustees in their place. All the property, except certain real estate in Philadelphia, was lost by the devastavit of the original trustees; the remaining property being known as "No. 43 South Second Street," "No. 221 Arch Street," and "Nos. 1127 and 1129 Pine Street."

Ann Appleton, the donee of the power, died in March, 1883, domiciled in the state of New Jersey, leaving to survive her certain children, all of whom, it is conceded, were born during the life-time of John Lawrence. By her last will and testament in writing, which was afterwards duly probated, she devised to George W. Appleton, and, in the event of his renunciation or decease, to the Philadelphia Trust, etc., Company, certain property of her own, in Haddonfield, N. J., and also all that remained of the property over which she held the power of appointment, under the will of John Lawrence, specifically referring thereto, in trust to care for the same, and collect the income thereof, during the joint lives of her children, all of whom, as we have said, were living at the death of John Lawrence; to pay out of such income and the proceeds of sale of the Haddonfield property, if sold under the authority given, certain annuities mentioned, during

the uncertainty of the event, holding that, if the person is ascertained, his interest may be conveyed, subject to the contingency of the event. *Grayson v. Tyler*, 80 Ky. 358 (1882); *Robinson v. Ins. Co.*, 75 Misc. Rep. 361, 133 N. Y. Supp. 257 (1912). See *Jenkins v. Bonsal*, 116 Md. 629, 82 Atl. 229 (1911).

¹ For discussion of principles, see *Burdick*, *Real Prop.* § 161.

that period; and, after the expiration of said joint lives, to transfer the corpus of the property to the New York Baptist Union for ministerial education, which is the corporate name of what is known as the "Rochester Theological Seminary." George W. Appleton died December 1, 1886, and, the Philadelphia Trust, etc., Company having renounced the trust, the office of trustee under the appointment in the will of Ann Appleton became vacant; whereupon Ann Eliza Griffin, one of the annuitants for life, presented her petition for the appointment of a successor to the trust created by the donee of the power.

The appellants resisted this application, alleging that the execution of the power by Ann Appleton was invalid, and that Mrs. Griffin had, therefore, no standing in court to ask for the appointment of a trustee, the estate having passed to those entitled in remainder, under the will of John Lawrence, deceased, as if Ann Appleton had died intestate. Their contention is—First, that the appointment violates the rule against perpetuities, and is therefore wholly void; and, second, that, while the donee of the power by its terms could make a direct, immediate, and absolute appointment of the fee, she was not authorized to declare uses and trusts as contained in her will.

The rule, as stated in *Gray on Perpetuities*, is as follows: "No interest, subject to a condition precedent, is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being, at the creation of the interest." This rule is in force in all of the states where the principles of the common law prevail, excepting as it may have been modified by statute. In Pennsylvania it is unaffected by statute, only as it is modified by the acts of 18th April, 1853, § 9, and 26th April, 1855, § 12, which were suggested by the Thellusen Act, and operate only in restraint of accumulations. It seems to be conceded, and rightly too, we think, that, although Ann Appleton was domiciled at her death in New Jersey, the validity of the appointment, if there should be any conflict, is to be determined by the laws of Pennsylvania, which is the *lex rei sitæ*. Any inquiry as to the law of New Jersey is therefore rendered unnecessary. The rule, as stated, applies to interests in realty or in personalty, whether legal or equitable, but has no application to an interest which is vested, for a vested interest by its very nature cannot be subject to a condition precedent. So, also, where a power of appointment is given, either by deed or will, the rule applies as well to the power as to the appointment. If a power can be exercised at a time beyond the limits of the rule it is bad.

As, in the case at bar, however, the power must be exercised, if at all, in the life-time of Ann Appleton, a life in being at the time of its creation, it cannot be impeached upon that ground; and, although the power to be exercised by will only is in the most general terms, it is not rendered bad by the fact that, within its terms, an appointment might possibly have been made which would be too remote. *Gray*,

Perp. § 510. The direct and specific object of the power, according to its terms, is not to create a perpetuity; and, as the exercise of it is necessarily according to a certain discretion or latitude of choice in the donee, the security which the law provides against the violation of the law of remoteness is in the failure of any disposition which results from the abuse of that discretion. Lewis, Perp. 487.

The question, therefore, is upon the validity of the appointment which was in fact made. As a general rule, whether an appointment made in execution of a power is too remote depends upon its distance from the creation of the power, and not from its execution. Gray, Perp. § 514; Lewis, Perp. 484. The exception is when the power is general to the donee to appoint, to whomsoever he may choose, either by deed or will. In such case the donee has absolute control as if he had the fee, since he can appoint as well to himself as to any other person. He is practically the owner. In such case the degree of remoteness is measured from the time of the exercise of the power, and not from the time of its creation. *Bray v. Bree*, 2 Clark & F. 453; Sugd. Powers, 394, 683; Lewis, Perp. 483; Gray, Perp. §§ 477-524; *Mifflin's Appeal*, 121 Pa. 205, 15 Atl. 525, 1 L. R. A. 453, 6 Am. St. Rep. 781.

But it will be seen that the power given to Ann Appleton is a power to be exercised by will only. Her authority is not commensurate with the entire ownership. She could not appoint to herself, nor to any other person, to take in her life-time. She had not the absolute control, and, although the decisions are somewhat conflicting, and the question not free from doubt, the better opinion seems to be that the power must be regarded as special; and therefore the remoteness of the estate created by the appointment must be measured from the time of the creation of the power, which was at the death of John Lawrence. See *In re Powell's Trusts*, 39 Law J. Ch. 188; Gray, Perp. § 526; and cases there cited. No estate or interest can be limited under a particular power, which would have been too remote if limited in the deed or will creating the power. Lewis, Perp. 488. But, assuming that the remoteness of the appointment depends upon its distance from the creation of the power, it is plain that the several bequests and annuities made in the last will and testament of Ann Appleton, deceased, were to persons named and in being, for distinct and separable sums of money, by way of bequest or annuity, out of the proceeds of her own and the income of the original trust estate.

The manifest purpose of the trust was to preserve the estate for the legatees and annuitants for the life of her children and the survivor of them. At the death of the last child her surviving, their object would be fully attained; the annuities, whether to children, grandchildren, or to others, were then to terminate, and the entire trust-estate then remaining was to be conveyed to the New York Baptist Union, etc., in fee, to be applied as by the will is directed. We have

then a devise to the trustees, in trust for the annuitants, for the life of the children of the donee, and the survivor of them, with a remainder over in fee to the Baptist Union. Ann Appleton, as the donee of the power, had the right by her will to appoint to whom she chose. She certainly had a right to appoint to her children for life, or to trustees for their use for life, whether they were born before or after the decease of John Lawrence; and that, although the estate in remainder might be too remote, the annuitants would take at her decease. "Where, under a power, interests are given by way of particular estate and remainder, (including analogous gifts of personal estate,) and the particular estate is limited to a valid object of the power, but the remainder is too remote, the appointment will not be wholly void, but only the gift in remainder. In such case, the interests, in respect of which there is an excess of the power, being distinct and separable from the valid portion of the appointment, there is no reason for involving the primary limitation in the remoteness of the remainder." Lewis, *Perp.* 496; citing *Adams v. Adams*, *Cowp.* 651; *Bristow v. Warde*, 2 *Ves. Jr.* 336; *Routledge v. Dorril*, *Id.* 357; *Brudenell v. Elwes*, 1 *East*, 442, 7 *Ves.* 382; *Butcher v. Butcher*, 9 *Ves.* 382; *Gray, Perp.* §§ 232, 239, 242, citing *Read v. Gooding*, 21 *Beav.* 478, 4 *De Gex, M. & G.* 510, and other cases. See, also, *Davenport v. Harris*, 3 *Grant Cas.* 168. In this respect we think the ruling in *Smith's Appeal*, 88 *Pa.* 492, was wrong; for, although Ryan's daughter, Mrs. Smith, might have had children born after his decease, her children, whether born before or after Ryan's death, would have taken at her death, and the life-estates were therefore good; whereas, it was held that her appointment was wholly bad.

This statement of the law would seem to be decisive of the case at bar, for the proceeding is not by the party entitled in remainder for a conveyance, but by one of the annuitants for the appointment of a trustee, for the purposes of the trust subsisting under the will of Ann Appleton, for the benefit of the annuitants, during the life of her children. But the estate of the Baptist Union also vested at the death of Ann Appleton. The beneficiaries under her will are described by name; to each is given a separate and distinct sum by way of legacy or annuity; to each one *eo nomine*; and, as we have said, their rights vested at their mother's death. The remainder was ready, at any time after the death of Ann Appleton, to come into the possession of the Baptist Union whenever and however the life-estate might determine. It was subject to no condition precedent, save the determination of the preceding estate. The contingency was not annexed to the gift, or to the person entitled, but to the time of enjoyment merely; and, according to all the cases, the remainder must be treated, not as a contingent, but as a vested, estate. If this be so the rule against remoteness is satisfied, for not only the particular estate, but the remainder supported by it, took effect within lives in being at

the creation of the power. "The particular feature," says Mr. Lewis, in his treatise on Perpetuities, "in limitations of future interests, with which the rule against perpetuities is connected, is the time of their vesting, or, in other words, of their becoming transmissible to the representative of the grantee, devisee, or legatee, and disposable by him. When they are so limited as necessarily to allow this quality, within the legal period of remoteness, they are free from objection in reference to the perpetuity rule." Upon this question we may also refer to *Mifflin's Appeal*, 121 Pa. 205, 15 Atl. 525, 1 L. R. A. 453, 6 Am. St. Rep. 781. "If a remainder is vested, that is, if it is ready to take effect whenever and however the particular estate determines, it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or lives in being." Gray, *Perp.* § 209. Perpetuities are grants of property wherein the vesting of an estate is unlawfully postponed. *Philadelphia v. Girard's Heirs*, 45 Pa. 26, 84 Am. Dec. 470; *Barclay v. Lewis*, 67 Pa. 316. The main question decided in *Smith's Appeal* is therefore not involved in this case. The accuracy of that decision has been somewhat doubted by the learned judge who wrote it, (*Coggins' Appeal*, 124 Pa. 10, 16 Atl. 579, 10 Am. St. Rep. 565) but the subject can only be further considered when a proper case is presented.

Nor do we think the appointment is invalid, because in the exercise of the power the donee, without special direction of John Lawrence, the testator, to that effect, in appointing the fee, declared certain uses and trusts for life, with remainder over. The power conferred upon Mrs. Appleton by her father's will was "to grant and convey the real estate in fee," "in such parts or shares" as she by her last will should direct. The power is wholly unrestricted. The entire discretion is committed to the donee of the power to grant the fee in such form and to such persons as she chose. In the exercise of that power she did appoint the fee, and we think she was authorized, observing the rule against remoteness, to declare such uses and trusts for life as would best carry out her wishes with respect to the ultimate disposal of the property. No authorities have been cited to any different effect. On the contrary, appointments in trust, even under restricted powers, would seem to have been sustained, and, as illustrations of this, we have been referred to *Alexander v. Alexander*, 2 Ves. Sr. 642; *Trollope v. Linton*, 1 Sim. & S. 477; *Crompe v. Barrow*, 4 Ves. 681; *Willis v. Kymer*, 7 Ch. Div. 181; 2 Sugd. Powers, 273, 274.

The decree of the orphans' court is affirmed, and the appeal dismissed at the cost of the appellants.

2. APPLICATION OF THE RULE

SEAUER v. FITZGERALD.

(Supreme Court of Massachusetts, 1886. 141 Mass. 401, 6 N. E. 73.)

This was a real action in which the demandant claimed title to, and sought to recover possession of, a parcel of land in Lawrence. The plea was nul disseizin. Hearing in the superior court before Gardner, J., who found the following facts: The demandant claimed title to the premises by descent, as next of kin and heir at law of Annie J. Rafferty, who died at Lawrence in 1879. One Hugh Rafferty, at the time of his death in 1873, was seized in fee-simple and possessed of said premises, so described in the writ in this action. Said Hugh left a last will and testament, which was duly proved and allowed in the probate court for the county of Essex. At the time of said Hugh Rafferty's death, his sole heir and next of kin was his daughter, Annie J. Rafferty, named in said will as cestui que trust. Said Annie J. died at said Lawrence in 1879, intestate, unmarried, and without issue. The demandant is her heir; the said Elizabeth being the sister of said Hugh Rafferty, who was the father of said Annie. The tenant, Fitzgerald, was in possession of said premises claiming a title in fee there-to under a deed from the Augustinian Society, named in said will, to whom said trustees conveyed the same after the death of Annie J. Rafferty. The demandant claimed that the devise to the Augustinian Society was void, and the deed of the trustees to it therefore passed no title.

Upon the foregoing facts the court ruled that the demandant could not maintain her action in law, and reported the case for the consideration of the full court. The material part of the will of said Hugh Rafferty was as follows:

"Item 12. I give, bequeath, and devise all the remainder of my property, real, personal, and mixed, of which I shall die seized and possessed, or to which I shall be entitled to at the time of my decease, to my said executors, Patrick Sweeney and Thomas Conway, to hold in trust, to use so much of the income thereof as shall be needed to give my daughter, Annie J. Rafferty, a good and suitable support so long as she shall live; also, if she shall ever have a child or children, my said executors shall support them in a proper manner from said income or property during the life of each and all. The balance of said income and the property, after death of my said child and her child or children, (if any,) shall all be paid over by my executors for the sole use and benefit of the Augustinian Society of Lawrence, a body corporate, duly established by the laws of this commonwealth in the year of our Lord eighteen hundred and seventy, to said corporation forever."

C. ALLEN, J. There is no objection, on the ground of remoteness, to a gift to unborn children for life, and then to an ascertained person, provided the vesting of the estate in the latter is not postponed too long. *Loring v. Blake*, 98 Mass. 253; *Evans v. Walker*, 3 Ch. Div. 211; *In re Roberts*, 19 Ch. Div. 520; *Lewis*, Perp. 417-511.

In all the cases cited by the demandant's counsel, the gift over was to persons who might not be ascertainable with certainty within the allowed time. But the present case is not of that class. There was no contingency or uncertainty as to who should finally take. The estate or interest vested in the Augustinian Society, a body corporate absolutely and at once, upon the testator's death, subject to the preceding life-estates. All that is required by the rules against perpetuities is that the estate or interest should vest within the prescribed period. The right of possession may be postponed longer. Moreover, the devise was to take full effect, with right of possession, upon the death of the testator's daughter, Annie, if she should leave no child. In point of fact, she left none. Therefore, in this alternative contingency, not only the estate, but the right of possession, would certainly vest within the permitted period; and as this contingency is the one which happened, the validity of the devise would not be affected by the consideration that the other contingency might be too remote. *Jackson v. Phillips*, 14 Allen, 572, and cases there cited.

On both grounds the entry must be, judgment for the tenant.

3. EFFECT OF VIOLATING THE RULE

See *Proprietors of Church in Brattle Square v. Grant*, ante, p. 212.

II. Estates and Interests Subject to the Rule *

See *Proprietors of Church in Brattle Square v. Grant*, ante, p. 212; also *Appeal of Appleton*, ante, p. 356.

III. Exceptions to the Rule *

See *Proprietors of Church in Brattle Square v. Grant*, ante, p. 212.

* For discussion of principles, see *Burdick*, Real Prop. § 162.

* For discussion of principles, see *Burdick*, Real Prop. § 163.

(B) Rights in the Land of Others**EASEMENTS, PROFITS À PRENDRE, AND RENTS****I. Easement Defined¹****1. DISTINGUISHED FROM LICENSE**

YEAGER v. TUNING.

(Supreme Court of Ohio, 1908. 79 Ohio St. 121, 86 N. E. 657, 19 L. R. A. [N. S.] 700, 128 Am. St. Rep. 679.)

Error to Circuit Court, Gallia county.

Action by Garret Yeager and others against John P. Tuning and others. A demurrer to the petition was sustained in the circuit court, and plaintiffs bring error. Affirmed.

It is averred in the petition that the plaintiffs and the defendants mutually agreed orally to construct a telephone line over and across their respective lands and to their respective residences thereon to enable them to have telephonic communication with each other and with persons on other lines with which such line might be connected; that each agreed at his own expense to erect and maintain a certain number of poles, and that the plaintiffs and defendants agreed to contribute equally money to purchase and string the wires and to contribute equally sufficient money to repair and maintain the line; that the line was constructed as agreed; that it was of a permanent nature and of the value of \$250; that each of the parties expended about \$15 additional for telephone boxes and other appliances, and that the line was in use for about three years, and until shortly before the filing of the petition when certain of the defendants cut the wires and cut down certain of the poles and rendered the line in places useless, and they pray for a mandatory order requiring the replacing of the poles and the restoring of the line, and for an injunction against the destruction or interference with the line in the future. The case went to the circuit court on appeal, where a demurrer was sustained and the petition dismissed.

SUMMERS, J. (after stating the facts as above). If the plaintiffs are entitled to a specific performance of the agreement, then they have an easement created by parol in the lands of the defendants. An easement is a right without profit, created by grant or prescription, which the owner of one estate may exercise in or over the estate of another for the benefit of the former. A license is a personal, revocable, and nonassignable privilege, conferred either by writing or parol, to do

¹ For discussion of principles, see Burdick, Real Prop. §§ 166-179.

one or more acts upon land without possessing any interest therein. *Greenwood Lake & P. J. Railroad Co. v. N. Y. & G. L. Railroad Co.*, 134 N. Y. 435, 31 N. E. 874.

Section 4198, Rev. St., provides that: "No lease, estate or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned, or granted, except by deed, or note in writing, signed by the party so assigning or granting the same, or his agent thereunto lawfully authorized, by writing, or by act and operation of law." This statute would seem to settle the question of the right to a decree for specific performance against the plaintiffs, but it is contended that it is the well-settled law of this state that such an agreement is a parol license, and that such license, when executed is irrevocable.

Mr. Freeman in a note to *Lawrence v. Springer*, 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702-715, says: "At common law a parol license to be exercised upon the land of another creates an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license, or expended money in reliance thereon. In many of the states this rule prevails, while in others the licensor is deemed to be equitably estopped from revoking the license, after allowing the licensee to perform acts thereunder, or to make expenditures in reliance thereon. These two lines of cases cannot be reconciled; for one of them holds that an interest in land cannot be created by force of a mere parol license, whether executed or not, while the other declares that where the licensee has gone to expense, relying upon the license, the licensor may be estopped from revoking it, and thus an easement may be created. The former line of cases, it seems to us, is founded upon the better reason. They decide that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable, at the option of the licensor, and this although the intention was to confer a continuing right, and money has been expended by the licensee upon the faith of the license. Such license cannot be changed into an equitable right on the ground of equitable estoppel." To the same effect is *Browne* on the Statute of Frauds, § 31; *Jones on Easements*, § 84; *Bigelow on Estoppel* (5th Ed.) 666.

In *Lawrence v. Springer*, 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702, *Beasley, C. J.*, says: "It has not been, and it cannot be, denied that such a grant as the one in question cannot be enforced in a court of law. Such easements, being incorporeal, lie in grant, and their creation requires an instrument under seal. Nor is it questioned, nor questionable, that a parol imposition of a servitude of this kind upon land is in flat contradiction of the statute of frauds. It is true, indeed, that in one class of cases, as is well known, courts of conscience have felt dispensed from putting in force the provisions of that act. This has been the course pursued where a parol agreement for the

purchase of lands, or of some interest in them, has been performed to the extent of possession having been taken in part execution of such contract. But, while this is the undeniable rule in equity, it should be ever borne in mind that its introduction has been regretted by the wisest judges. 'The statute,' says Lord Redesdale, 'was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practicing in courts of equity than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been vigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements from the necessity of the case would have been reduced to writing. Whereas it is manifest that the decisions on the subject have opened a new door to fraud.' And these strictures are pointed with the emphatic declaration that 'it is therefore absolutely necessary for courts of equity to make a stand, and not carry the decisions further.' *Lindsay v. Lynch*, 2 Schoales & L. 4. And in the same vein, Judge Story (2 Story's Eq. Jur. § 766) says that 'considerations of this sort have led eminent judges to declare that they would not carry the exceptions of cases from the statute of frauds further than they were compelled to do by former decisions.' To the same purpose are the criticisms of Chancellor Kent in *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 149, and of Chancellor Zabriskie in *Cooper v. Carlisle*, 17 N. J. Eq. 529."

Pomeroy, in his work on Specific Performance of Contracts, referring to the doctrine of the irrevocability of a parol license when executed, says that it is opposed to the common-law doctrine concerning licenses as it prevails in England and in most of the American states. In *Rodefer v. Railroad*, 72 Ohio St. 272, 74 N. E. 183, 70 L. R. A. 844, the opinion of Andrews, J., in *Crosdale v. Lanigan*, 129 N. Y. 604, 29 N. E. 824, 26 Am. St. Rep. 551, was quoted from at length with approval, and it is unnecessary to repeat here what was said there. In that opinion he says that it is plainly the rule of the statute, as well as the rule required by public policy, that such a license, though executed, is revocable. See, also, *Hicks v. Swift Creek Mill Company*, 133 Ala. 411, 31 South. 947, 57 L. R. A. 720, 91 Am. St. Rep. 38; *Pitzman v. Boyce*, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536; *Thoemke v. Fiedler and Another*, 91 Wis. 386, 64 N. W. 1030; *Stewart v. Stevens*, 10 Colo. 440, 15 Pac. 786; *St. Louis National Stock Yards v. Wiggins Ferry Company*, 112 Ill. 384, 54 Am. Rep. 243. The cases are too numerous to cite, but may be readily found by reference to the reports and textbooks already cited.

The early cases were grounded on some early English cases which were overruled in the leading case of *Wood v. Leadbitter*, 13 Meeson & W. 838. The cases of *Wilson et al. v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574, and *Hornback v. Cincinnati & Zanesville Railroad Company*, 20 Ohio St. 81, are cited as supporting the doctrine of the irrevocability of such a license. The former seems to have been based

upon precedents that were in accord with the early English decisions, which, as we have seen, have been overruled. The later case is not authority for the doctrine, but is a case of a parol agreement for the purchase of an interest in lands which has been performed to the extent of possession having been taken in part execution of the contract. The later case, decided by the Supreme Court Commission (Wilkins v. Irvine, 33 Ohio St. 138), is not in accord with the earlier doctrine, but is in accord with the modern doctrine, and it is there held that: "A written license, without seal and unacknowledged to enter upon and imbed water pipes in the land of another, with privilege to enter and repair them, creates no interest in, nor incumbrance upon, the land such as will disable the owner thereof from making a good and sufficient deed conveying a good title thereto." It may be added that in that case the written license had been executed, and in the opinion it is said (page 144): "It gave the Cleveland Rolling Mill Company no dominion over the land, nor did it create, in its favor, an easement in the land. If its terms had been violated by Brooks or his grantees, the jurisdiction of a court of equity could not have been successfully invoked to enforce a specific performance. The remedy, if any it had, would have been an action for damages."

Judgment affirmed.²

PRICE, C. J., and SHAUCK, CREW, and SPEAR, JJ., concur.

DAVIS, J. (dissenting). The contrary rule has been a rule of property in this state for more than 60 years. *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574. It is in the strictest sense *stare decisis*, and is no longer an open question for the courts. If there is any demand for a change of the law, the Legislature alone is competent to decide whether a change so vital to property rights which have been acquired under the existing rule should be made.

SHAW v. PROFFITT.³

(Supreme Court of Oregon, 1910. 57 Or. 192, 110 Pac. 1092,
Ann. Cas. 1913A, 63.)

In the former case, reported in 109 Pac. 584, defendant appealed from a decree declaring plaintiff to be the owner of a certain canal or irrigating ditch built by him across defendant's lands under an irrevocable license, the right to the uninterrupted use and enjoyment of the same for the purpose of conveying water to his lands for irrigation, and perpetually enjoining defendant from interfering with such ditches. Plaintiff alleged that he obtained from Proffitt and his predecessors in interest the right, consent, permission, and license to ex-

² For further definition of an easement, see *Canfield v. Ford*, reported herein, ante, p. 5.

³ The statement of facts is rewritten.

cavate, use, and maintain a main ditch, called his "upper ditch," which, as originally constructed, was $4\frac{1}{2}$ feet in width at the top and from $1\frac{1}{2}$ to 3 feet in depth and to use a certain canyon or gulch, leading from his main ditch on the west side of defendant's land easterly to a lateral or part of the "lower ditch," first excavated by him, and leading to the S. W. $\frac{1}{4}$ of section 33, an insulated portion of his lands. The decree was in plaintiff's favor as to the upper ditch, but against him as to the right to use the said canyon or gulch. This decree was affirmed. The present case arises upon a petition for rehearing. Denied.

EAKIN, J.⁴ * * * A distinction is made by counsel between a license and an easement. The latter, he contends, can only be created by solemn writing. The rule is that an easement can only be created by writing under seal, but there are exceptions well recognized in equity. It may be created by adverse user, by estoppel, or part performance of a parol agreement. An express oral license may be revocable at any time before it is executed, for it creates no interest in the land; but if executed—that is, if expenditures be made in permanent improvements in reliance thereon, inuring to the benefit of the licensor—then it becomes irrevocable, and if it relates to the use or occupation of real estate it becomes an easement. This is recognized in many cases. In *Curtis v. La Grande Water Co.*, supra [20 Or. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484], Mr. Justice Lord, quotes with approval from *Jackson v. Railroad Co.*, 4 Del. Ch. 180, which, in laying stress upon the necessity for a clear case to make a license irrevocable, says that the effect will be to convert what was originally a bare privilege into an easement in the licensor's land, perpetually binding it and transmissible from the licensee. The author of the note at 49 L. R. A. 497, says: "The moment it [the license] ceases to be so revocable it creates an interest in the land, and rises to the dignity of an estate or an easement." See, also, *Pope v. Henry*, 24 Vt. 560; *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370; *Metcalf v. Hart*, 3 Wyo. 513, 546, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

The licensee's right to relief is on the ground of fraud, against which equity will always relieve by estoppel on account of the fraud or by specific performance of an oral agreement partly performed to prevent fraud, whether the fraud be actual or constructive, intentional or nonintentional. *Metcalf v. Hart*, 3 Wyo. 513, 547, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122. See note to *Hall v. Chaffee*, 13 Vt. *157, by Mr. Justice Redfield. In *Metcalf v. Hart*, supra, it is said: "Cases may arise and have arisen where a license to occupy land has been intended and understood as a mere personal favor to the licensee to give him a place to live, or to occupy for some other beneficial purpose not transmissible, but revocable at will. Then expenditures would naturally be made accordingly. In other cases the granting of the license has been in terms an assurance of permanent possession. It is evident that the same rule cannot apply to both classes of

⁴ Part of the opinion is omitted.

cases. The revocation of the license, even after expenditures made in consequence of it, in the one case is a right, in the other a fraud. No general rule can be made as to the revocability of such licenses after such expenditures. Each case stands upon its own circumstances. When we have traveled through the mass of decisions, cloudy and conflicting at times, and have arrived at the principle that equity will relieve where there is fraud, actual or constructive, we have arrived at principle in regard to which there is no conflict. And courts of equity * * * are very generally agreed that the revocation of a parol license to permanently occupy and improve realty after any considerable expense has been incurred on the faith of such license, under circumstances such that the parties cannot be placed in statu quo, is either actual or constructive fraud." Much of this language is quoted evidently with approval as a conclusion to the note in 7 Ann. Cas. 717. See, also, *Mason v. Hill*, 27 E. C. L. 15, *Liggins v. Inge*, 20 E. C. L. 304, and *Lowe v. Adams*, 2 Ch. (Eng.) 598, in which a doubt is expressed as to whether *Wood v. Leadbitter*, 13 Meeson & Welsby's Rep. 538, which seems to hold to the contrary and is frequently quoted as expressing the rule in England, is good law.

The license in this case, as gathered from the letter of Failing, which is: "I have just * * * found your letter of the 19th inst., asking for right of way through my land in Powder River Valley. Would say go ahead. The more ditches you build, the better it will suit me"—is express authority to construct the ditch, and, in view of all the circumstances, did not contemplate a temporary affair, but a permanent right of way. It is indefinite as to the location and extent of the ditch; but, when they were located and constructed, both became definite. The whole ditch was constructed at great expense, viz., \$6,000 or \$7,000, to convey water for irrigation upon plaintiff's land, and the part upon defendants' lands is only a small part thereof; the ditch being about 16 miles long. A permanent way appears to have been the intention of the parties, and such intention must control. *Brown v. Honeyfield*, 139 Iowa, 414, 116 N. W. 731; *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497, 509.

Again, it is urged that, even though the license is irrevocable as to the licensor, it is not so as to his grantee. But the authorities that hold the license irrevocable also hold that it is binding upon the grantee of the licensor who took with notice. 3 Pom. Eq. Jur. § 1295; *Bush v. Sullivan*, 3 G. Greene (Iowa) 344, 54 Am. Dec. 506; *Beatty v. Gregory*, 17 Iowa, 109, 85 Am. Dec. 546; *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370; *Simons v. Morehouse et al.*, 88 Ind. 391; *Metcalf v. Hart*, 3 Wyo. 513, 548, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122. Counsel for defendant, in his brief, concedes this, saying: "We have no doubt that, under the liberal rule established by these cases, the promise of Failing would be enforced by almost any court of equity against Failing and also against any successor to Fail-

ing who took with either actual or constructive notice of the burden existing on the estate in favor of Shaw." And as to notice Pomeroy says: "If a purchaser, or incumbrancer, dealing concerning property of which the record title appears to be complete and perfect, has information of extraneous facts or matters in pais sufficient to put him on inquiry * * * respecting some outstanding interest, claim, or right, which is not the subject of record, and he omits to make inquiry, he will be charged with constructive notice of all the facts which he might have learned by means of a due and reasonable inquiry." 2 Pomeroy, Eq. § 613. See, also, *Petrain v. Kiernan*, 23 Or. 455, 457, 32 Pac. 158.

This principle is applied in case of a water ditch in *McDougal v. Lame*, 39 Or. 212, 214, 64 Pac. 864. In *German Savings & Loan Society v. Gordon*, 54 Or. 147, 156, 102 Pac. 736, 739 (26 L. R. A. [N. S.] 331), Mr. Chief Justice Moore, in discussing the same principle, says: "We are unable to discover any valid reason for a distinction in the rules of law applicable to servitudes depending upon whether they are continuous or discontinuous, except in the matter of the greater conspicuity which the former usually affords. An artificial ditch in which water regularly flows must necessarily be a constant reminder to all beholders of the changed condition of the surface of the earth, whereby the dominant tenement is drained or irrigated. * * * A discontinuous quasi easement, when evidenced in a similar substantial manner, ought to pass by implied grant as an appurtenant to the dominant tenement, when the latter is severed by a conveyance thereof." And in 23 A. & E. E. 499, it is said: "It is generally held that the possession of itself operates as constructive notice, and consequently that it is immaterial that the purchaser was actually ignorant that the land was adversely held, especially where he could have easily acquired knowledge of the fact, but neglected to visit the premises."

Defendant testified that when he and Russell purchased the land there was a ditch coming onto the land at the south and across the land, and onto Shaw's place on the north; and Mr. Russell testifies: "When we bought this land, it was our understanding through Mr. Williams (who negotiated the purchase for Russell and Proffitt) that there was no writing granted by Mr. Failing, and he was selling it to us. He said Mr. Shaw had no legal right through that place"—showing clearly that, at the time of the purchase, they knew of Shaw's claim and had talked it over. This was sufficient to put defendant upon inquiry, which constitutes notice, and, taken in connection with their recognition of the ditch thereafter, tends strongly to establish that the defendant was chargeable with knowledge of Shaw's rights. *Carter v. City of Portland*, 4 Or. 339. They thereafter recognized Shaw's rights in permitting him to complete the upper ditch, regarding which Russell testified: "As I understood he would vacate the lower ditch, and I had talked with Mr. Chenault about getting water and putting

water down there, and of course we spoke of those ditches, that we could use them for laterals ourselves."

Defendant further contends that plaintiff cannot rely upon an estoppel, because none is pleaded. A cursory examination of the pleadings will show that no occasion has arisen requiring plaintiff to plead it. The complaint alleges the license, and the facts necessary to constitute it an irrevocable license. The answer in relation thereto contains only admissions and denials; and, there being no affirmative allegation, he is asserting nothing that he ought not to be heard to allege. If by the answer he had raised the question of the statute of frauds, or that the license was in parol, the estoppel might have been raised by demurrer, as the facts are set out in the complaint. This was so held in *Oregonian Ry. Co. v. Oregon R. & N. Co.* (C. C.) 22 Fed. 245, 249, 10 Sawy. 464, 471, where it is said that, "if this fact did not already appear in the complaint, the plaintiff could not have the benefit of the estoppel, unless he set it up in a replication; and that is the way in which the point is generally made in the pleadings. But in this case the matter which operates as an estoppel—the contract of leasing—is set forth in the complaint. In such case the defendant [plaintiff] may claim the benefit of the estoppel by demurrer to the plea, which contains the defense, of a want of corporate existence or power." There are many authorities to this effect. See *Adams v. Patrick*, 30 Vt. 516, and 8 Pl. & Pr. 9, and cases there cited.

The allegations of the complaint disclose an irrevocable license, and proof thereof establishes plaintiff's case. If the question of estoppel arose upon the trial, then plaintiff could establish it by the evidence; but it seems to have been raised in this court for the first time.

Counsel also contend that Failing's license to Shaw to construct the ditch cannot affect or bind the land then owned by his wife and daughter, and relies upon *Houston v. Zahm*, 44 Or. 610, 76 Pac. 641, 65 L. R. A. 799, as conclusive upon that question. But that case is readily distinguishable from the one before us. In the *Zahm Case* the contract contemplated that the University would purchase certain land and should thereafter open and maintain a public street across the same. This is a provision for an easement upon the land of the University, when acquired, to be constructed and maintained at the expense of the owner. No expense or act by the grantee is involved. Second, there was no dominant estate. Only an easement in gross was contemplated. Third, the easement did not create a covenant running with the land; that is, it was an agreement concerning land but not an estate in the land.

In the present case Failing was acting as owner, and personally authorized Shaw, who supposed him to be the owner, to construct the ditch on the Failing land, not an easement in gross, but an irrigation ditch appurtenant to his land. This was partly executed by Shaw in good faith at great expense, and thereafter, while recognizing Shaw's right, Failing acquired the title, and equity will interpose an estoppel

as though he held the title at the time the license was granted, in which case the after-acquired title will inure to the benefit of the licensee. 11 A. & E. Ency. 403. In the *Zahm Case* the street was to be erected at the owner's expense, on land thereafter to be acquired by it, which was not done, and estoppel cannot be invoked. In 26 A. & E. 114, it is said it will not defeat an action for specific performance by a vendor that he did not have title to the property in question at the time the contract was made, provided he will be able to convey at the time of the rendition of the decree. To the same effect is *Watterman on Spec. Perf.* § 409. And the converse of that statement is elementary. If the vendor is able to perform at the time of the suit, he will be required to do so at the suit of the vendee, even though he had no title at the time of making the agreement. The same principle will apply in favor of the licensee in a suit to enjoin a revocation of an executed license. *Washburn on Easements & Servitudes* (2d Ed.) says: "But the ordinary doctrine of estoppel by deed applies in case of a grant of an easement; so that, if a person without title profess to convey an estate, or to grant an easement, his conveyance operates by way of estoppel, if at a subsequent period he acquires the fee, and the subsequently acquired estate is bound thereby, or, as it is termed, the newly acquired estate feeds the estoppel."

The petition is denied.⁵

KING, J., dissents.

⁵ There are many cases holding, in accord with the foregoing, that where a licensee has incurred expense by making valuable improvements, equity will not allow the license to be revoked, but will regard the license as an easement. See, for example, *Johnson v. Lewis*, 47 Ark. 66, 14 S. W. 466 (1885); *Smith v. Green*, 109 Cal. 228, 41 Pac. 1022 (1895); *Gyra v. Windler*, 40 Colo. 366, 91 Pac. 36, 13 Ann. Cas. 841 (1907); *Joseph v. Wild*, 146 Ind. 249, 45 N. E. 467 (1896); *Patterson v. Burlington*, 141 Iowa, 291, 119 N. W. 593 (1909); *Kastner v. Benz*, 67 Kan. 486, 73 Pac. 67 (1903); *St. John v. Sinclair*, 108 Minn. 274, 122 N. W. 164 (1909); *Hudson Tel. Co. v. Jersey City*, 49 N. J. Law, 303, 8 Atl. 123, 60 Am. Rep. 619 (1887). It is contended, however, upon principle, that a mere oral license is revocable at will, regardless of the fact of valuable improvements made by the licensee, and this view is supported by the weight of authority. See *Turner v. Mobile*, 135 Ala. 73, 33 South. 132 (1902); *West Chicago St. Ry. Co. v. People*, 214 Ill. 9, 73 N. E. 393 (1905); *Whittemore v. New York, etc., R. Co.*, 174 Mass. 363, 54 N. E. 867 (1899); *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406, 78 N. W. 338 (1899); *Cook v. Ferbert*, 145 Mo. 462, 46 S. W. 947 (1898); *Johanson v. R. Co.*, 73 N. J. Law, 767, 64 Atl. 1061 (1906); *Fowler v. Delaplain*, 79 Ohio St. 279, 87 N. E. 260, 21 L. R. A. (N. S.) 100 (1909). And see 25 Cyc. 648, for many other cases. Some cases hold that an oral permission to use land, followed by valuable improvements, is in fact an oral grant of an easement, instead of a mere license, and when improvements are made upon the faith of such a promise equity will regard the improvements as such a part performance of the agreement as to take the case out of the statute of frauds. See *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rep. 582 (1872); *Houston v. Laftee*, 46 N. H. 508 (1866). And see, also, *Wood v. Leadbitter*, 13 Mees. & W. 838 (1845), where Baron Alderson says: "A mere license is revocable, but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident." In the case of *Johnson v.*

II. Creation of Easements *

1. BY GRANT

See Yeager v. Tuning, ante, p. 363.

2. BY RESERVATION OR EXCEPTION

DEE v. KING.

(Supreme Court of Vermont, 1905. 77 Vt. 230, 59 Atl. 839, 68 L. R. A. 860.)

Appeal in chancery, Franklin county; H. R. Start, Chancellor.

Suit by George B. Dee against Francis King. Bill dismissed, and orator appeals. Reversed.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

WATSON, J. When this case was here before (73 Vt. 375, 50 Atl. 1109) the decree was reversed pro forma, and the cause remanded for additional findings of fact by the special master as to the time when, with reference to March 16, 1882, Jared Dee asked and obtained permission of the defendant to cross his three-acre piece of land on the east side of the Central Vermont Railroad. On the hearing before the master for this purpose the orator introduced no further evidence. The defendant testified in his own behalf, and from his testimony the fact is found that Jared Dee first asked and obtained of the defendant permission to cross that land in January, 1882. The orator seasonably objected and excepted to the defendant's testifying to any conversation had between him and Jared Dee on this point, because Jared Dee was dead. The defendant was called and used as a witness by the orator at the first hearing upon the question, among other things, whether Jared Dee passed through and over the three-acre piece, his habit and custom in so doing, to what extent, under what circumstances, and for what purpose. The orator made the defendant a general witness upon that question, and he thereby waived the statutory incompetency of the defendant as a witness (Paine v. McDowell, 71 Vt. 28, 41 Atl. 1042; Ainsworth v. Stone, 73 Vt. 101, 50 Atl. 805), and he could not afterwards com-

Skillman, 29 Minn. 95, 12 N. W. 149, 43 Am. St. Rep. 192 (1882), the court says: "The doctrine of the early cases, which converted an executed license into an easement, is now generally discarded as being 'in the teeth of the statute of frauds.'" And see, also, Pitzman v. Boyce, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536 (1892).

* For discussion of principles, see Burdick, Real Prop. § 168.

plain because the defendant gave testimony in his own behalf more fully upon the same subject-matter.

Jared Dee having obtained permission of the defendant to cross the three-acre piece within 15 years next after March 16, 1867, the orator can have no prescriptive way over it. A right of way over this land is neither set forth nor claimed by the orator in his bill; yet, in one aspect of the case, whether he has such a way is material. The only right of way claimed by the orator over the defendant's land, so far as appears by the bill, is over the one-half acre piece on the west side of the Central Vermont Railroad, as reserved by Jared Dee in his deed dated October 7, 1862, conveying that land to William W. Pettingill. In that deed, immediately following the description of the land conveyed, is the clause, "reserving the privilege of a pass from the highway past the house to the railroad in my usual place of crossing." The defendant contends that these words are only a reservation of a personal privilege to Jared Dee, which could not pass to his heirs or assigns, because no words of inheritance or assignment were used in connection therewith; while the orator contends that the clause has the force of an exception, and that the servient estate thereby created passed to the subsequent owners of the dominant estate without such words of limitation being used.

Much depends upon the construction given in this regard in the disposition of the case. Lord Coke says that "reserving" sometimes has the force of "saving" or "excepting," "so as sometime it serveth to reserve a new thing, viz. a rent, and sometime to except part of the thing in esse that is granted." Co. Litt. 143a. Sheppard says that "a reservation is a clause of a deed whereby the feoffer, donor, lessor, grantor, etc., doth reserve some new thing to himself out of that which he granted before. And this doth, most commonly, and properly, succeed the tenendum. * * * This part of the deed doth differ from an exception which is ever of part of the thing granted, and of a thing in esse at the time, but this is of a thing newly created or reserved out of a thing demised that was not in esse before, so that this clause doth always reserve that which was not before, or abridge the tenure of that which was before." Shepp. Touch. 80. Again, the same author says that an exception clause most commonly and properly succeeds the setting down of the things granted; that the thing excepted is exempted, and does not pass by the grant. Page 77. The same principles were largely laid down by this court in *Roberts v. Robertson*, 53 Vt. 690, 38 Am. Rep. 710. There the deed given by the plaintiff contained a specific description of the land conveyed, and a clause "reserving lots * * * 32, 33," etc. Under this clause the plaintiff claimed title to the two lots above named. The court, after stating the offices of an exception and of a reservation the same as above, said these terms, as used in deeds, are often treated as synonymous, and that words creating an excep-

tion are to have that effect, although the word "reservation" is used. It was held that the clause should be construed as an exception.

In England it has been held that a right of way cannot, in strictness, be made the subject of either an exception or a reservation; for it is neither parcel of the thing granted, an essential to an exception, nor is it issuing out of the thing granted, an essential to a reservation. *Doe v. Lock*, 2 Ad. & E. 705; *Durham, etc., R. R. Co. v. Walker*, 2 Q. B. 945. But there, as in this country, quasi easements are recognized in law—such as a visible and reasonably necessary drain or way used by the owner of land over one portion of it to the convenient enjoyment of another portion—and there has never been any separate ownership of the quasi dominant and the quasi servient tenements. As such easement a drain is classed as continuous, because it may be used continuously without the intervention of man; and a right of way as noncontinuous, because to its use the act of man is essential at each time of enjoyment. In *Barnes v. Loach* (1879) 4 Q. B. D. 494, it was said regarding such easements of an apparent and continuous character that, if the owner aliens the quasi dominant part to one person and the quasi servient to another, the respective alienees, in the absence of express stipulation, will take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to them. And in *Brown v. Alabaster* (1888) 37 Ch. D. 490, it was said that, although a right of way by an artificially formed path over one part of the owner's land for the benefit of the other portion could not be brought within the definition of a continuous easement, it might be governed by the same rules as are apparent and continuous easements.

Cases involving quasi easements have been before this court. In *Harwood v. Benton & Jones*, 32 Vt. 724, the owner of a water privilege, dam, and mill also owned land surrounding and bordering upon the millpond and mill, which he subjected to the use and convenience of the mill privilege and mills. A part of these adjacent lands thus subjected was conveyed without any stipulation in the deed that any servient condition attached thereto. The condition of the estate had been continuous, was obvious, and of a character showing that it was designed to continue as it had been. The court said this was a palpable and impressed condition, made upon the property by the voluntary act of the owner. It was held that without any stipulation in the deed upon that subject the law was that the grantee took the land purchased by him in that impressed condition, with a continuance of the servitude of that parcel to the convenience and beneficial use of the mill. It was there laid down as an unquestioned proposition that "upon the severance of a heritage a grant will be implied of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have had no

legal existence as easements," and that the doctrine was equally well settled that the law will imply a reservation of like easements in favor of the part of the inheritance retained by the grantor. In *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671, a "visible, defined way in use for the obvious convenience of the whole building" was in question, consequent on a division of the property among the representatives of the deceased owner, and the same principles of law were applied. And in *Wiley, Adm'x, v. Thwing*, 68 Vt. 128, 34 Atl. 428, applying the same doctrines, a right of way was upheld under an implied reservation.

In this country it is commonly held that a way may be the subject of a reservation, and in many cases courts of high standing have held that it may properly be the subject of an exception in a grant. While it is true that an owner of land cannot have an easement in his own estate in fee, he may, as before seen, have a quasi easement over one portion in the character of a visible, traveled way reasonably necessary to the convenient enjoyment of another portion; and when such a way exists there would seem to be no substantial legal reason why it may not be treated as a thing in being, and, as a part of the estate included in the description of the grant, be made an exception in a deed of the land over which the way is, when such appears to have been the intention of the parties. That this is the principle upon which a clause reserving a way is construed as an exception appears from *Chappell v. N. Y., N. H. & H. R. R. Co.*, 62 Conn. 195, 24 Atl. 997, 17 L. R. A. 420, which is more particularly referred to later. There the court said: "Then, too, the right to cross was, in a certain sense, a right existing in the grantors at the date of the deed. It was a part of their full dominion over the strip about to be conveyed by the deed, and not a right to be, in effect, conferred upon them by the grantees. It was something which the 'reservation' in effect 'excepted' out of the operation of the grant."

The distinction between a reservation and an exception of a way is best understood by an examination of cases involving clauses very similar to the one here under consideration, yet so unlike as to require different constructions in this regard. In *Ashcroft v. Eastern R. R. Co.*, 126 Mass. 196, 30 Am. Rep. 672, the clause was, "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever, through a culvert * * * to be built and kept in repair by said company; which culvert shall cross the railroad at right angles," etc. It was held that the provision that the grantee should build and keep in repair the culvert was an essential part of the grant, and clearly indicated that the intention of the parties was to confer upon the grantor a new right not before vested in him, which, therefore, could not be the subject of an exception. In *Clafin v. Boston & Albany R. Co.*, 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638, the clause was, "reserving to ourselves the right of

a passageway, to be constructed and kept in repair by ourselves." There was no evidence of an existing way across the land. It was held to be a reservation, and not an exception.

In *Chappell v. N. Y., N. H. & H. R. R. Co.*, before cited, John W. and Benjamin F. Brown, in 1851, owned a piece of land in New London fronting on the river Thames, and lying between that river and Bank street. On the river front was a wharf and docks. Between the wharf and Bank street was about $1\frac{1}{2}$ acres of land used by the Browns in carrying on a coal and wharfage business. The wharf was valuable. In that year the Browns conveyed, for railroad purposes, a strip of this land, 25 feet wide, running through the land, and separating the wharf from the land lying westerly of the strip conveyed, and rendering it inaccessible except by crossing the strip. This right of crossing was indispensable to the Browns and all who might thereafter own the premises then owned by them. The deed thus conveying this strip contained the clause, "And we reserve to ourselves the privilege of crossing and recrossing said piece of land described, or any part thereof within said bounds." The way at the time of the date of the deed was an existing one, plainly visible, necessary, and in almost constant use. The clause was construed to be an exception.

In *Bridger v. Pierson*, 45 N. Y. 601, the defendant conveyed land to the plaintiff, and immediately following the description the deed contained the clause, "reserving always a right of way as now used on the west side of the above-described premises * * * from the public highway to a piece of land now owned by" R. It was held to be an exception. In *White v. N. Y. & N. E. R. R. Co.*, 156 Mass. 181, 30 N. E. 612, the action was tort for the obstruction of a private way claimed by the plaintiff over the location of the defendant's railroad, under a clause in a deed which read, "reserving the pass-way at grade over said railroad where now made." This way had existed as a defined roadway or cart track, and had been used in passing to and from a highway to and from parts of the lot north of the tracks before the railroad was located, and before the deed referred to was given. The clause was held to be an exception.

These are but a few of the many decisions in different jurisdictions which might be referred to upon this question, but more are unnecessary.

The language of the clause under consideration cannot be said to be unequivocal. We therefore look at the surrounding circumstances existing when the deed containing it was made, the situation of the parties, and the subject-matter of the instrument, and in the light thereof the clause should be construed according to the intent of the parties. At the time of making this deed Jared Dee was the owner of land on the opposite side of the railroad, consisting of a three-acre piece of tillage land, and a hill lot adjoining it on the north,

chiefly valuable for its sugar works, for its pasturage, and as a wood and timber lot. The last-named lot is traversed its entire length from north to south and about a third of its width from west to east by a considerable hill, more or less ledgy, and making it extremely inconvenient to cross from the grantor's own land north of the Fairbanks land, but easily reached by the now disputed right of way across the one-half acre piece and over the three-acre piece of tillage land. The greater portion of Jared Dee's sugar orchard, timber, and wood was on top and east of this hill. There was no way to or out of the hill lot except over the hill on Jared Dee's own land west of the Fairbanks land, or out through the three-acre piece and the one-half acre piece onto the public highway leading westerly to Jared Dee's house. For more than 10 years next prior to the time when Jared Dee gave the deed to Pettingill the Dees had passed over the one-half acre piece and through the three-acre piece almost exclusively for all purposes whenever they went to or from the hill lot, whether with team, on foot, or in any other manner, except when they got wood on the west side of the lot they went from the highway across the Fairbanks farm west of the railroad, thence over the railroad at the "middle crossing" onto the hill lot. And on rare occasions they used still another route further north, wholly over Dee's land.

It appears from the deed itself that in crossing the one-half acre piece they had a particular place of traveling then known to both the grantor and the grantee, for the words used in the deed in describing it are "from the highway past the house to the railroad in my usual place of crossing"; thus showing the intention of the parties to be that the grantor should retain the right to pass through this land over a visible traveled way then in existence, and that no new way was thereby being created for his benefit. Clearly, under the law, and in the light of the foregoing circumstances, the clause must be construed, not as a reservation, but as an exception. When given this construction, technical words of limitation are not applicable, for the part excepted remained in the grantor as of his former title, because not granted. *Cardigan v. Armitage*, 2 Barn. & C. 197; *Chappell v. N. Y., N. H. & H. R. R. Co.*, before cited; *Winthrop v. Fairbanks*, 41 Me. 307. We think the parties intended that by this provision the grantor should permanently retain from the grant for the benefit of his land east of the railroad the way over the one-half acre piece, which he had been accustomed to use in crossing that land to and from the land first named. The way thus retained became an easement over the half-acre piece of land and an appurtenant to the other land, and with the latter it would pass by descent or assignment.

Subsequent to conveying the one-half acre lot to Pettingill, Jared Dee sold and conveyed the three-acre piece, which through mesne conveyances has become the property of the defendant. But this cannot affect the easement as an appurtenant to the hill lot, for a right

of way appurtenant to land attaches to every part of it, even though it may go into the possession of several persons. *Lansing v. Wiswall*, 5 Denio, (N. Y.) 213; *Underwood v. Carney*, 1 Cush. (Mass.) 285.

The master finds that if, upon the facts reported, the orator has a right of way or a right to cross over defendant's land to the hill lot, then the orator has suffered damage by reason of the acts of the defendant complained of in the bill to the amount of \$65. The orator can recover only such damages as he has suffered by acts of the defendant in obstructing the way across the one-half acre piece, considering the fact that the orator had no right of way over or right to cross the defendant's three-acre piece. Upon this basis the damages have not been assessed. The report should therefore be recommitted for that purpose, and, upon such damages being reported, a decree should be rendered that the injunction be made perpetual, and that the defendant pay to the orator the damages found, with costs in this court. The costs in the court below should be there determined.

The decree dismissing the bill, with costs to the defendant, is reversed, and cause remanded, with mandate.⁷

3. BY IMPLIED GRANT

HILDRETH v. GOOGINS.

(Supreme Judicial Court of Maine, 1898. 91 Me. 227, 39 Atl. 550.)

Exceptions from supreme judicial court, York county.

Action by Herbert L. Hildreth against Lizzie Googins. Verdict for plaintiff. Defendant moves for a new trial, and excepts. Motion and exceptions overruled.

STROUT, J. The controversy in this case is whether there is a right of way from the lot of land occupied by the defendant at Old Orchard, as tenant of the heirs of William Emery, over and across the plaintiff's land to the street, as appurtenant to defendant's lot. At the

⁷ In England, a right of way cannot be made the subject either of exception or reservation. As Tindal, C. J., said in *Durham & Sunderland Railway Co. v. Walker*, 2 Q. B. 960, 114 Eng. Reprint, 372 (1842), a right of way "is neither parcel of the thing granted, nor is it issuing out of the thing granted; the former being essential to an exception, and the latter to a reservation. A right of way 'reserved' to a lessor (as in the present case) is, in strictness of law, an easement newly created by way of grant from the grantee or lessee. * * * It is not indeed stated in this case that the lease was executed by the lessee, which would be essential in order to establish the easement claimed by the lessors as in the nature of a grant from the lessee; but we presume that in fact the deed was, according to the ordinary practice, executed by both parties, lessee as well as lessor." And see *London Corporation v. Riggs*, 13 Ch. D. 798 (1880).

trial below the right of way was claimed first by deed, second by prescription, and third by necessity. The evidence failed to sustain either of the first two claims, and they are abandoned here. But it is strenuously contended that a way of necessity exists from defendant's lot across that of plaintiff.

Lawrence Barnes on June 15, 1871, owned in one tract the land, part of which is now owned by the plaintiff and part by the heirs of William Emery. On that day he conveyed to one Seavey that part of the land now occupied by defendant. William Emery derived title under this deed through mesne conveyances. Barnes' deed to Seavey did not contain any grant of a right of way across Barnes' remaining land. Plaintiff derives his title through deed from Barnes to Francis Milliken, dated October 16, 1879, and mesne conveyances. The land owned by the Emery heirs is bounded on one side by the ocean. No access to it from the street can be had, except by the ocean or crossing land of other owners. Under these circumstances it is claimed that the conveyance by Barnes to Seavey implied a grant of a way over and across the plaintiff's lot, then owned by Barnes, as appurtenant to defendant's lot.

"Implied grants of this character are looked upon with jealousy, construed with strictness, and are not favored, except in cases of strict necessity, and not from mere convenience." *Kingsley v. Improvement Co.*, 86 Me. 280, 29 Atl. 1074, 25 L. R. A. 502. In that case it was held by this court that, as free access to the land over public navigable waters existed, a way by necessity over the grantor's land could not be implied. The same rule applies here. Defendant's land borders on the ocean, a public highway, over which access to her land from the street can be had. It may not be as convenient as a passage by land, but necessity, and not convenience, is the test. *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *Dolliff v. Railroad Co.*, 68 Me. 176; *Stevens v. Orr*, 69 Me. 324. There is no evidence in the case that the water way is unavailable.

The court instructed the jury that the ocean was a public highway; and to a question by a juror, "whether the ocean was a public highway if it was not available, and whether it was for the jury to decide whether it is available in the present case," the court replied "that if there was any evidence as to availability it was for them to decide, but, if there was no evidence, they must assume that it was available." They were further instructed "that cases must be decided upon the evidence introduced, and not with reference to any individual knowledge that any juror may have; and I give now the general instruction that, nothing appearing to the contrary, the ocean is a highway."

Exception is taken to these instructions. But they are so clearly in consonance with well-established principles and the decisions of

this court that it is unnecessary to discuss them. *Kingsley v. Improvement Co.*, *supra*; *Rolfe v. Rumford*, 66 Me. 564.

We perceive no reason for disturbing the verdict upon the motion. Motion and exceptions overruled.⁸

4. BY PRESCRIPTION

LEHIGH VALLEY R. CO. v. McFARLAN.⁹

(Court of Errors and Appeals of New Jersey, 1881. 43 N. J. Law, 605.)

DEPUE, J.¹⁰ * * * The defendant also contended at the trial that the right to maintain its dam at its present height had been acquired by adverse enjoyment. If the defendant, or the canal company, under whom it claims, has acquired the right in dispute by prescription, the subject already discussed becomes of no importance in this litigation. It will be necessary, therefore, to examine the instructions of the judge on this head.

The instruction was, in substance and effect, that mere verbal protests and denial of the right, without any interruption or obstruction in fact, of the enjoyment of the right, would prevent the acquisition of an easement by adverse user. This instruction follows the opinion of the Vice-Chancellor, in *Lehigh Valley R. R. Co. v. McFarlan*, 30 N. J. Eq. 180.

At common law there was no fixed period of prescription. Rights were acquired by prescription only when the possession or enjoyment was "time whereof the memory of man ran not to the contrary." By 20 Hen. III, c. 8, the limitation in writs of right dated from the reign of Henry II. By 3 Edw. I, c. 39, the limitation was fixed from the reign of Richard I. By 21 Jac. I, c. 16, the time for bringing possessory actions was limited to twenty years after the right accrued. These statutes applied only to actions for the recovery of land; none of them embraced actions in which the right to an incorporeal hereditament was involved. But by judicial construction an adverse user of an easement for the period mentioned in the statutes, as they were passed from time to time, became evidence of a prescriptive right; and finally, the fiction was invented of a lost grant, presumed from

⁸ Contrary to the rule of strict necessity laid down in the *Maine* cases, *supra*, and some others (see *Buss v. Dyer*, 125 Mass. 287 [1878]; *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664 [1900]), it is the general view that the degree of necessity required is such as makes for the convenient and comfortable enjoyment of the property. See *Cave v. Crafts*, 53 Cal. 135 (1878); *Bitello v. Lipson*, 80 Conn. 497, 69 Atl. 21, 16 L. R. A. (N. S.) 193, 125 Am. St. Rep. 126 (1908); *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300 (1871); *Cannon v. Boyd*, 73 Pa. 179 (1873).

⁹ For the first part of this case, see *post*, p. 584.

¹⁰ Part of the opinion is omitted.

such user to have once been in existence and to have become lost. The fiction of a lost grant seems to have been devised after the statute of James. It was called a lost grant, not to indicate that the fact of the existence of the grant originally was of importance, but to avoid the rule of pleading requiring profert. Allegation of the loss of the grant excused profert and bringing the instrument into court.

Whatever strictures may have been made upon this method of judicial legislation, the fiction has been promotive of beneficial results, and forms the basis of prescriptive titles, and it is now too late to question the validity of its introduction. The doctrine of lost grant forms part of the law of the land, and any dislike which may be felt for this and like fictions cannot be allowed to interfere with the carrying out of the doctrines involved in them to the full extent, which has been sanctioned by established authority. *Angus v. Dalton*, 4 Q. B. D. 161, per Thesiger, L. J.

At a very early period it was held that when by the statute of limitations the seizin in a writ of right was limited to the time of Richard I., although a man might prove to the contrary of a thing whereof the prescription was made, yet this should not destroy the prescription if the proof was of a thing before the said time of limitation. 2 Roll. Abr. 269; 17 Vin. Abr. 272, "Prescription," M. Afterwards, when the fiction of a lost grant was devised, there arose considerable diversity and fluctuation in judicial opinions as to whether an uninterrupted user for the period of limitation conferred a legal right or raised merely a presumption of title which would stand good until the presumption was overcome by evidence which negatived, in the judgment of juries, the existence of a grant. This state of the law produced great insecurity to titles by prescription, and subjected such rights to the whim and caprice of juries. This evil was remedied by the later English authorities, which gave to the presumption of title arising from an uninterrupted enjoyment of twenty years the most unshaken stability, and made it conclusive evidence of a right. 3 Kent, 445. The judicial expression of opinion in England, nearest to the time of the separation of the colonies from the mother country, is that of Lord Mansfield, in *Cowper*, 215, where he says that effect is given to the presumption, "not that in such cases the court really thinks a grant has been made, because it is not probable a grant should have existed without its being upon record, but they presume the fact for the purpose and from the principle of quieting the possession." The question has been set at rest in England by the statute 2 and 3 William IV. But no one can examine the English cases for half a century preceding the statute, without observing that the statute in its main features was simply declarative of the law as expressed by the great weight of judicial opinions.

In this country the prevailing doctrine is that an exclusive and uninterrupted enjoyment for twenty years creates a presumption, juris

et de jure, and is conclusive evidence of title whenever, by possibility, a right may be acquired by grant.

In the class of legal presumptions established by judicial decisions which have become part of the common law of the land, and are imperative rules of law against the operation of which no averment or evidence, is received, Prof. Greenleaf classes the presumption of a grant arising from an exclusive and uninterrupted enjoyment for the period of prescription. 1 Greenl. Ev. § 17. He also says that, by the weight of authority, as well as the preponderance of opinion, it may be stated as the general rule of the American law, that an enjoyment of an incorporeal hereditament, adverse, exclusive and uninterrupted for twenty years, affords a conclusive presumption of a grant or a right, as the case may be, which is to be applied as a *presumptio juris et de jure*, wherever by possibility a right may be acquired in any manner known to the law. 2 Greenl. Ev. § 539. This passage is quoted and adopted by another distinguished writer on American law, as a correct exposition of the law on the subject. 2 Washb. on Real Prop. 449. This doctrine has the support of Mr. Justice Story, in *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312, and is approved and enforced by Justices Wilde and Putnam, in the two leading cases of *Coolidge v. Learned*, 8 Pick. (Mass.) 504, and *Sargeant v. Ballard*, 9 Pick. (Mass.) 251.

The difference between the English law, in the state it had reached before the statute 2 and 3 William IV., and the American law, is slight. In England the presumption was dealt with as a presumption of fact; but for all practical purposes it was a legal presumption, as it depended on pure legal rules. *Coolidge v. Learned*, per Putnam, J. Though the evidence of enjoyment was, in theory, presumptive evidence only of prescription, yet it was, in practice and effect, conclusive. *Gale on Easms.* (95) 149. At last the English Court of Appeals held that the presumption arising from the uninterrupted enjoyment of an easement, operated as an estoppel by conduct, not conclusive, so far as to exclude denial or explanation of the conduct, but a bar to any simple denial of the fact, which is a mere legal inference drawn from such conduct; and consequently that the circumstance that no grant of the easement had been made was not material. *Angus v. Dalton*, 4 Q. B. Div. 162.

In this state the law may be considered as settled in accordance with the prevailing doctrine in the courts of this country. In *Campbell v. Smith*, 8 N. J. Law, 143, 14 Am. Rep. 400, Chief Justice Ewing, speaking of a right acquired by adverse user, says: "Statutes of limitation prescribing the time within which an entry shall be made into lands, tenements or hereditaments, and within which every real, possessory, ancestral, mixed or other action for any lands, tenements or hereditaments shall be brought, are not deemed to comprehend in terms, and within their purview, the right now under consideration;

but, upon the wise principle of such statutes, and in analogy to them, to quiet men in possession, and to put an end and fix a limit to strife, a rule is established that, after the lapse of the period mentioned in those statutes, a grant will be presumed, not, says Lord Mansfield (Cowper, 214), that in such cases the court really thinks a grant has been made, but they presume the fact for the purpose of and from a principle of quieting the possession. The period of twenty years is settled in England, according with the time mentioned in the statute of 21 Jac. I. Our statute prescribing a like period, our rule is the same." This passage was quoted by Chancellor Vroom, in *Shreve v. Voorhees*, 3 N. J. Eq. 32, as a correct expression of the law of New Jersey. The same principle was adopted by Chancellor Pennington, in *Shields v. Arndt*, 4 N. J. Eq. 247, by Chancellor Zabriskie, in *Carlisle v. Cooper*, 19 N. J. Eq. 259, and by the Supreme Court, in *Wood v. Hurd*, 34 N. J. Law, 87. In the case last cited, Mr. Justice Van Syckel, in discussing the kindred subject of a dedication to the public acquired by user, says that "mere acquiescence for twenty years, unaccompanied by any act which repeals the presumption of such intention" (to dedicate) "is conclusive evidence of abandonment to the public."

The owner of the servient tenement cannot overcome the presumption of right arising from an uninterrupted user of twenty years, by proof that no grant was in fact made. He may rebut the presumption by contradicting or explaining the facts upon which it rests; but he cannot overcome it by proof in denial of a grant. He may show that the right claimed is one that could not be granted away, or that the owner of the servient tenement was legally incapable of making, or the owner of the dominant tenement incapable of receiving such a grant. *Rochdale Canal v. Radcliffe*, 18 Q. B. 287; *Ellwell v. Birmingham Canal*, 3 H. of L. 812; *Staffordshire Canal v. Birmingham Canal*, L. R. 1 H. of L. 254; *Thorpe v. Corwin*, 20 N. J. Law, 312. He may explain the user or enjoyment by showing that it was under permission asked and granted, or that it was secret and without means of knowledge on his part, or that the user was such as to be neither physically capable of prevention nor actionable. *Chasemore v. Richards*, 7 H. of L. Cas. 349, *Webb v. Bird*, 13 C. B. (N. S.) 841; s. c. 10 C. B. (N. S.) 268; *Sturges v. Bridgman*, 11 Ch. Div. 852. But if there be neither legal incompetency nor physical incapacity, and the user be open and notorious, and be such as to be actionable or capable of prevention by the servient owner, he can only defeat the acquisition of the right on the ground that the user was contentious, or the continuity of the enjoyment was interrupted during the period of prescription.

In defining title by prescription, Sir Edward Coke says, both to customs and prescriptions, these two things are incidents inseparable, viz., possession or usage and time. Possession must have these qualities:

It must be long, continual and peaceable; long, that is, during the time defined by law; continuous, that is, that it may not have been lawfully interrupted; peaceable, because if it be contentious and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. Co. Lit. 113b. By a long course of decision, the word "interrupted," when applied to acts done by the servient owner, has received a fixed meaning as indicating an obstruction to the use of the easement, some act of interference with its enjoyment, which, if unjustifiable, would be an actionable wrong. This meaning has been given to the word as used in the statute 2 and 3 William IV (Parke, B., in *Olney v. Gardner*, 4 M. & W. 495), and is its usual signification.

Sir Edward Coke gives no illustration of what was meant by contentious, except "opposition on good grounds," and by a quotation from Bracton, who wrote in a primitive era of English law, before the doctrine of prescription, as applied to incorporeal hereditaments, had been subjected to the formative processes of judicial expositions from which the present state of the law is derived. The expression "opposition on good grounds" implies an act which would afford an opportunity to submit its validity to the test of judicial decision, and is more consistent with the idea of an interference with the enjoyment of the right, such as would give the owner ability to go into court and establish his right, than with the supposition that prescriptive rights should be forever kept in abeyance by acts which gave persons claiming them, no power by suit at law to establish the right. In the passage quoted by Coke from Bracton, this early writer says: "I use the term peaceable, because if it be contentious, it will be the same as before, if the contention has been just; as if the true lord forthwith, when the intruder or disseizor has entered into seizin, endeavors soon and without delay (if he should be present, or if absent when he shall have returned,) to repel and expel such persons by violence, although he cannot carry out to its effect what he has commenced, provided, however, when he fails he is diligent in requesting and in pursuing." Bract. fols. 51, 52. Mr. Goddard, in discussing an enjoyment which is not peaceable, defines *vi* in the phrase *vi clam aut precario*, to mean violence or force and strife, or contention of any kind; and the illustration he gives is where the enjoyment has been during a period of litigation about the right claimed, or the user has been continually interrupted by physical obstacles placed with a view of rendering user impracticable. Goddard on Easem. 172. In the English cases, peacefulness and acquiescence (when the servient owner knows or might have known that a right is claimed against his interest) are used indifferently as equivalent to uninterrupted.

In this country several decisions have been referred to as holding that prohibitions, remonstrances and denials of the right by the owner of the servient tenement, unaccompanied by any act of interference

with the enjoyment of the easement, will prevent the acquisition of the right. These cases are a legitimate outcome of the doctrine that the presumption is not a presumption *juris et de jure*, but is a presumption merely, liable to be rebutted by the proof of circumstances overcoming the presumption of a grant. This doctrine is supposed to have its chief support in *Powell v. Bagg*, 8 Gray (Mass.) 441, 69 Am. Dec. 262.

In *Powell v. Bagg*, proof that the owner, when on the land, forbade the party claiming an easement of the flow of water over his premises to enter, and ordered him off, while there for the purpose of repairing the aqueduct, was adjudged to be competent evidence of an interruption, and an instruction that words, however strongly denying the right claimed or forbidding its exercise unaccompanied by any act or deed, was not an interruption of the user or enjoyment, was held to be defective and tended to mislead the jury. The evidence before the trial court is not fully reported. Evidence that the owner of the land forbade the other party to enter, and ordered him off, was undoubtedly competent as part of the plaintiff's case. Whether what occurred at that time would amount to an interruption of the easement, would depend upon circumstances, upon the conduct of the party when forbidden to enter or when ordered off. If the owner of the servient tenement, being on the premises, forbids the owner of the easement to enter for the purpose of enjoying it and orders him off, and the latter, on a well-grounded apprehension that the former means to enforce obedience to his commands, desists and withdraws, an action on the case for disturbance of the right would lie. This view must have been present in the mind of the court, else why restrict the prohibition to place-on the land? To give certainty to the owner's purpose? A prohibition delivered elsewhere might be so vehement and emphatic as to leave the denial of the right equally beyond a doubt. On any other view of the case, as was said in *C. & N. W. R. R. Co. v. Hoag*, 90 Ill. 340, "the circumstances of the place where the forbiddance was made, whether on or off the land, would be immaterial." If facts such as are above indicated, appeared in the case, the charge was, in the language of the court, "defective, and tended to mislead the jury in applying the evidence to the rule of law upon which the title of the defendant to the easement rested." Certain expressions from the opinion have been quoted as indicating that a verbal denial of the right will operate, *ipso facto*, to determine the right. If that view be adopted, or the suggestion of Mr. Justice Woodbury (3 Woodb. & M. 551), that complaints and the taking of counsel against such encroachments will bar the right, be followed, it is obvious that rights by prescription will be of little value.

None of the authorities cited by the learned judge in *Powell v. Bagg* goes to the extent contended for. The passage quoted from

Bracton, that an easement will be acquired by its exercise under a claim of right *per patientiam veri domini qui scivit et non prohibuit sed permisit de consensu tacito*, is followed by the comment that sufferance is taken for consent, and that if the lord of the property, through sufferance, has, when present and knowing the fact, allowed his neighbor to enjoy on his estate a servitude for a long time peaceably and without interruption from such enjoyment and sufferance, there is a presumption of consent and willingness. Bract. lib. 2, c. 23, § 1. In the passage referred to in Greenleaf, the language is that the user must be adverse—that is, under a claim of title—with the knowledge and acquiescence of the owner of the land, and uninterrupted. 2 Greenl. Ev. § 539. In *Sargent v. Ballard*, 9 Pick. (Mass.) 254, 255, Weld, J., in discussing the methods by which a claim of title by prescription may be controverted by disproving the qualities and ingredients of such a title, says that “evidence might be given to prove that the use had been interrupted, thereby disproving a continued acquiescence of the owner for twenty years.” In *Arnold v. Stevens*, 24 Pick. (Mass.) 112, 35 Am. Dec. 305, the plaintiffs’ claim was of a right to dig ore under a grant by deed. They had not exercised the right for forty years. In the meantime the owner had occupied and cultivated the surface of the land. The court held that there was no enjoyment hostile to the easement, for the owner of the land had done “nothing adverse to the rights of the owners of the easement—nothing to which they could object, or which would apprise them of the existence of any hostile claim, and no acquiescence, therefore, existed from which a conveyance could be presumed.” In *Monmouthshire Canal Co. v. Harford*, 1 C., M. & R. 614, evidence was given of applications made on behalf of the claimants of the easement for permission to exercise the right. The court held that permission asked for and received was admissible to show that the enjoyment was not of right nor continuous and uninterrupted, for “every time the occupiers asked for leave they admitted that the former license had expired, and that the continuance of the enjoyment was broken.” In neither of these cases was the effect of verbal remonstrances or complaints, as evidence of an interruption of enjoyment, considered.

Nor do the additional English cases cited by plaintiff’s counsel in his brief meet the point under consideration. * * * Mr. Goddard, writing after all these cases were decided, in his excellent treatise, says: “It is commonly said that no easement can be acquired by prescription if the user has been enjoyed *vi clam aut precario*. The word ‘vi’ does not simply mean by violence or force, but it means also by strife or contention of any kind—as, for instance, that the enjoyment has been during a period of litigation about the right claimed, or that the user has been continually disputed and interrupted by physical obstacles placed with a view of rendering the user impracticable.” Goddard on Easem. 172.

I have not discovered in the English cases any intimation that mere denials of the right, complaints, remonstrances, or prohibitions of user, will be considered interruptions of the user of an easement, or as indicating that the enjoyment of it was contentious. On the contrary, whenever the subject has been mentioned, it has elicited expressions of marked disapprobation of such a proposition. This is conspicuously apparent in the opinions of Bayley, J., in *Cross v. Lewis*, 2 B. & C. 689; of Lush, J., in *Angus v. Dalton*, 3 Q. B. D. 85; and of Thesiger and Cotton, Lords Justices, in the same case, as reported in 4 Q. B. D. 172, 186. Thesiger, L. J., in considering the nature of the evidence which shall contradict, explain or rebut the presumption of right arising from an uninterrupted possession of twenty years, says that it is "not sufficient to prove such circumstances as negative an actual assent on the part of the servient owner, or even evidence of dissent short of actual interruption or obstruction to the enjoyment." In *Angus v. Dalton*, the easement was not such as came within the statute 2 and 3 William IV; and the case was discussed and decided upon the principles of the common law, independently of the statutory provision.

Some confusion on the subject has arisen from the failure to discriminate between negative and affirmative easements; negative easements, such as easements of light, and of the lateral support of buildings, which cannot lawfully be interrupted except by acts done upon the servient tenement; and affirmative easements, such as ways and the overflowing of lands by water, which are direct interferences with the enjoyment by the servient owner of the premises, and may be the subject of legal proceedings as well as of physical interruption. This distinction is pointed out by the court in *Sturges v. Bridgman*, 11 Ch. D. 852. In *Angus v. Dalton*, the Queen's Bench decided that the negative easement of lateral support of buildings could not be acquired by prescription, for the reason that the owner of the adjoining premises had no power to oppose the erection of the building and no reasonable means of resisting or preventing the enjoyment of its lateral support from his adjoining lands. But this decision was overruled in the Court of Appeals. *Angus v. Dalton*, 3 Q. B. D. 85; 4 Id. 162. With respect to such an easement there is great force of reasoning in the contention that slight acts of dissent should avail to defeat the acquisition of a right; for it would be unreasonable to compel the owner of the adjoining lands to dig down and undermine the foundations or to put him to legal proceedings quia timet to preserve dominion over his property. But no such considerations of hardship or inconvenience exist when the easement is a right of way, which, whenever the right is exercised, is a palpable invasion of property and may easily be obstructed, or is an easement of flooding lands, which is really, though not technically, a disseizin pro tanto, and can easily be interrupted.

The whole doctrine of prescription is founded on public policy. It is a matter of public interest that title to property should not long remain uncertain and in dispute. The doctrine of prescription conduces, in that respect, to the interest of society, and at the same time is promotive of private justice by putting an end to and fixing a limit to contention and strife. Protests and mere denials of right are evidence that the right is in dispute, as distinguished from a contested right. If such protests and denials, unaccompanied by an act which in law amounts to a disturbance and is actionable as such, be permitted to put the right in abeyance, the policy of the law will be defeated, and prescriptive rights be placed upon the most unstable of foundations. Suppose an easement is enjoyed, say, for thirty years. If after such continuance of enjoyment the right may be overthrown by proof of protests and mere denials of the right, uttered at some remote but serviceable time during that period, it is manifest that a right held by so uncertain a tenure will be of little value. If the easement has been interrupted by any act which places the owner of it in a position to sue and settle his right, if he chooses to postpone its vindication until witnesses are dead or the facts have faded from recollection, he has his own folly and supineness to which to lay the blame. But if, by mere protests and denials by his adversary, his right might be defeated, he would be placed at an unconscionable disadvantage. He could neither sue and establish his right, nor could he have the advantage usually derived from long enjoyment in quieting titles.

Protests and remonstrances by the owner of the servient tenement against the use of the easement, rather add to the strength of the claim of a prescriptive right; for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, hostile and adverse; and if they be not accompanied by acts amounting to a disturbance of the right in a legal sense, they are no interruptions or obstructions of the enjoyment.

The instructions of the judge were erroneous in this respect. The jury should have been told that a continuous enjoyment under a claim of right for twenty years, not obstructed by some suable act, and having the other qualities of an adverse user, confers an indefeasible right. It is said that the instruction was given in view of evidence tending to show interruptions in fact of the right, and therefore the error was harmless. As the judgment will be reversed on other grounds, and the case may be retried, we prefer not to discuss the evidence at this time. * * *

¹¹ It is generally held in this country that, in analogy to the statute of limitations, which applies only to corporeal hereditaments, continuous, exclusive, and hostile use of an incorporeal hereditament for a period equal to the statute of limitations will amount to a presumption of a grant. *Clay v. Penzel*, 79 Ark. 5, 11, 94 S. W. 705 (1906); *Fleming v. Howard*, 150 Cal. 28, 30, 87 Pac. 908 (1906); *Null v. Williamson*, 166 Ind. 537, 544, 78 N. E. 76 (1906); *Bean v. Bean*, 163 Mich. 379, 128 N. W. 413 (1910); *House v. Montgomery*, 16

III. Particular Easements ¹²

1. RIGHTS OF WAY

See *Hildreth v. Googins*, ante, p. 378.

2. LIGHT AND AIR

DARNELL v. COLUMBUS SHOW CASE CO.

(Supreme Court of Georgia, 1907. 129 Ga. 62, 58 S. E. 631, 13 L. R. A. [N. S.] 333, 121 Am. St. Rep. 206.)

Error from Superior Court, Muscogee County; W. A. Little, Judge. Action by S. W. Darnell against the Columbus Show Case Company. Judgment for defendant, and plaintiff brings error. Reversed.

EVANS, J. The case made by the petition was substantially this: The owner of two adjoining lots leased them separately to the plaintiff and the defendant; the lease to the plaintiff being prior to that of the defendant. Upon the lot demised to the plaintiff was a three-room tenement, which was used as a dwelling house. The only means of lighting and ventilating two rooms thereof was by a single window in each room, which overlooked the premises demised to the defendant. The defendant, being a manufacturing corporation dealing in lumber, piled a quantity of lumber on the lot rented by it in such a manner as to obstruct the light and air necessary for the use and enjoyment of the tenement by the other tenant, and to cause rainwater to drip into the house, rendering the house damp, unwholesome, unhealthy, and uncomfortable. Other matters were also alleged, which will be noticed in a discussion of the special demurrers filed. The defendant demurred both generally and specially to the petition. The demurrers were sustained, and the petition dismissed.

The complaining tenant was a tenant by the year, and does not claim an express grant to an easement of light and air. Whatever right he may have to prevent his neighbor tenant from obstructing his window must be founded upon an implied grant of an easement in the use and enjoyment of light and ventilation over the adjoining land of his landlord at the time of his lease. There is much conflict in the American cases on the question of implied grant of these easements. In many

Mo. App. 170, 179 (1885); *Hindley v. Manhattan Ry. Co.*, 185 N. Y. 335, 78 N. E. 276 (1906); *Mason v. Yearwood*, 58 Wash. 276, 108 Pac. 608, 30 L. R. A. (N. S.) 1158 (1910). And see 14 Cyc. 1146, citing many other cases.

¹² For discussion of principles, see *Burdick*, Real Prop. §§ 173-179.

jurisdictions it is held that a lease of land upon which is a building depending for its light and air on windows therein, which overlook adjoining land of the landlord, does not include any right of light and air through such windows, unless expressly granted in the lease. *Myers v. Gemmel*, 10 Barb. (N. Y.) 537; *Keiper v. Klein*, 51 Ind. 316; *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175. Other courts lay down the doctrine that there is an implied grant in a lease of the right to light and air from the adjoining land of the landlord, where the situation and habitual use of the demised premises is such that the right to light and air is necessary to the beneficial enjoyment of the leased premises. *Case v. Minot*, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536. See note to this case in 22 L. R. A. 536, where many of the cases are collated.

The question of an implied grant of easement of light and air was before this court in *Turner v. Thompson*, 58 Ga. 268, 24 Am. Rep. 497. In that case it was held that "where an executrix sold half a lot of land, with a tenement thereon having windows opening upon the other half lot, and bought the other half herself at the same sale, she will be estopped from obstructing the passage of light and air through such windows, if those windows were necessary to the admission of sufficient light and air for the reasonable enjoyment of the tenement which she sold; aliter, if sufficient light and air can be derived from other windows opened, or which could conveniently be opened, elsewhere in the tenement to make the rooms reasonably useful and enjoyable." The principle deduced from this decision has been incorporated in Civ. Code 1895, § 3046, as follows: "A right to the easement of light and air over another's land through ancient lights or windows is not acquired by prescription; but where one sells a house, the light necessary for the reasonable enjoyment whereof is derived from and across adjoining land then belonging to the same owner, the easement of light and air over such vacant lot passes as an incident to the house sold, because necessary to the enjoyment thereof."

The principle here stated is equally applicable to a case where the owner of two adjoining lots leases one upon which there is a dwelling house dependable upon a window overlooking the adjoining lot for light and air. Indeed, the reason for the rule is more cogent in a case of tenancy than of purchase. Where one purchases a tenement depending for light and air upon a window overlooking the adjoining land belonging to his grantor, in order to prevent closing the window, he must show that he cannot get light and air elsewhere over his own land; that it is a real necessity that he get it at this easement; that he cannot get other lights to his own building over his own property at a reasonable cost. *Thompson v. Turner*, 69 Ga. 223. A tenant, without his landlord's consent, cannot change and alter the demised tenement in any material respect. Certainly he is under no duty to alter the demised tenement to meet any exigency produced by the act of his landlord to escape its consequences. The tenant is entitled to the use of

the tenement with such necessary privileges accruing from its situation to adjoining land of his landlord at the time of the demise, and the landlord cannot deprive him of the enjoyment thereof by changing the situation in such a material way as practically to make the tenement unfit for use.

We have thus far discussed the matter as if the complaint of the tenant were against his landlord, instead of against a tenant who subsequently rented from his landlord. It is not charged in the petition that the common landlord consented, expressly or impliedly, to the commission of the acts complained of, nor connived thereat. From the doctrine that a landlord is not responsible for the acts of strangers, it would follow that a tortious act done by one tenant to another tenant of a common landlord, without the authority, consent, or connivance of the landlord, is not the latter's tort, but the tort of him who does the act. *Perry v. Wall*, 68 Ga. 70. However, if the common landlord cannot use his adjoining land in such a manner as to shut out necessary light and air from a dwelling house which he has rented, one who thereafter rents the adjoining land has no greater right or privilege in respect thereto than his landlord possessed. It follows, therefore, that the defendant cannot justify its act under the lease.

The petition should not have been dismissed on general demurrer for another reason. It was alleged that the lumber was piled in such a way as to cause the rainwater to be thrown through the window of the plaintiff's bedroom, "thereby wetting petitioner's bedroom floor and his bedding and bedroom furnishings, and rendering petitioner's said house and bedroom especially damp, close, stuffy, unwholesome, and unhealthy, and exceedingly uncomfortable, to his great annoyance, and to the disturbance and violation of his right to the full, free, comfortable, and reasonable enjoyment of his said dwelling house and home." Here is charged a distinct physical invasion and interference with the plaintiff's possession, which is a positive tort. Although a tenant has no estate in the land, he is the owner of its use for the term of his rent contract, and can recover damages for any injury to such use resulting from a physical invasion of his possession. See *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. 1013.

There were several special demurrers to the petition. One was directed to the allegations respecting the plaintiff's condition in life, and the nature of his vocation. Simply that the plaintiff is a poor man, and his employment is that of a night watchman, which requires him to sleep in the day, would not make the defendant liable in damages for the interference of his slumbers caused by the noises incident to the operation of a lumber yard. Hence the sixteenth and twentieth paragraphs were subject to the special demurrers aimed at them. The allegations that the plaintiff had previously occupied the same house as a tenant for many years in the past, and was attached to the same, was entirely irrelevant, and properly stricken on demurrer.

The allegation in the seventeenth paragraph, that the plaintiff had

renewed his lease for another term, does not aid his case. When he renewed the lease, he took the premises as he found them, and cannot complain of conditions existing at the time of the renewal of his lease contract.

The twenty-second paragraph of the petition declared that the various acts and deeds set forth and complained of, both in themselves and in the intent with which they were done, constitute aggravating circumstances entitling petitioner to additional damages for which he sues. The mere wrongful obstruction of the plaintiff's light, without more, would not make the defendant liable in punitive damages. But if, as charged in the petition, the lumber was piled so as not only to exclude light and air from the plaintiff's dwelling, but also to throw the rainwater into his bedroom, and this was done by the defendant for the purpose of harassing the plaintiff with a view of causing him to abandon his lease, that the defendant might get possession of the property, it would be in the province of the jury to allow punitive damages.

The other special demurrers to which no special reference has been made should have been overruled. Judgment reversed. All the Justices concur.

IV. Profits à Prendre ¹³

PIERCE v. KEATOR.

(Court of Appeals of New York, 1877. 70 N. Y. 419, 26 Am. Rep. 612.)

Action of trespass for cutting wheat, originally brought by Ethan A. Pierce, plaintiff's intestate, who sowed the wheat. The wheat was taken from a strip of land formerly part of a farm owned by Pierce, and conveyed by him to the New York and Oswego Midland Railroad Company in fee, with the following reservation: "Said parties of the first part also to have the privilege of mowing and cultivating the surplus ground of said strip of land not required for railroad purposes." The farm was subject to a mortgage which was afterward foreclosed, and Elijah Wheeler became the purchaser. The defendant claims under Wheeler's title. The referee's deed to Wheeler embraced the entire farm "excepting and reserving however from the above-described premises the following described premises, viz." (here follows a description of the strip conveyed to the railroad company by metes and bounds, closing as follows): "Containing six acres and eighteen one-hundredths of an acre of land, more or less, which is reserved as conveyed to the said Oswego and Midland Railroad Company.

CHURCH, C. J. It is important to determine the nature of the right reserved in the deed of Pierce and wife to the New York and

¹³ For discussion of principles, see *Burdick*, Real Prop. § 180.

Oswego Midland Railroad Company. The reservation is in the following words: "Said parties of the first part also to have the privilege of mowing and cultivating the surplus ground of said strip of land not required for railroad purposes." The appellant contends that this right of mowing and cultivating was an easement appurtenant to the remaining portion of the farm, and would pass to the grantee of the remainder of the farm without description or specification. The term "easement" has sometimes been applied to rights in or over land without strict regard to the recognized distinctions between the different kind or class of rights. These distinctions may be impaired and even obliterated by the circumstances attending, and the manner of their creation.

An easement is a liberty, privilege or advantage in land without profit, existing distinct from the ownership of the soil. The essential qualities of easements are: First. They are incorporeal. Second. They are imposed upon corporeal property. Third. They confer no right to a participation in the profits arising from such property, and, Fourth. There must be two distinct tenements, the dominant to which the right belongs, and the servient upon which the obligation rests. *Bouv. Dict.*, title Easements; *Washb. Easem.*, chap. 1, § 1; *Wolfe v. Frost*, 4 Sandf. Ch. 89.

The right to profits, denominated profit à prendre, consists of a right to take a part of the soil or produce of the land, in which there is a supposable value. It is in its nature corporeal, and is capable of delivery, while easements are not, and may exist independently without connection with or being appendant to other property. 2 *Washb. Real Prop.* 26 (3d Ed.) 276; *Post v. Pearsall*, 22 *Wend.* 433. The right reserved in the deed of *Pierce* and wife was a right to profits in the land, and was not therefore in strictness an easement. From the nature of the right, we can see no connection between it and the ownership of the farm. The right to mow and cultivate this strip was in no way necessary to, or even useful to the remainder of the farm, and it was not therefore appurtenant. It might have been regarded in the nature of an easement if the reservation had been made to *Pierce*, as owner of the farm, or on account of being the owner, but the language reserves the right to the parties of the first part, not to their heirs and assigns, nor to the owners of the farm, nor for the benefit of the farm or such owners. As the terms of the reservation indicate a personal privilege, and as there is nothing in the nature of the right reserved connecting it in any manner with the ownership or use of the remainder of the farm, there seems no alternative but to apply the established rules and recognized legal distinctions to the transaction. *Chancellor Walworth*, in 22 *Wend.*, *supra*, said: "For a profit à prendre in the land of another, when not granted in favor of some dominant tenement, cannot be said to be an easement, but an interest or estate in the land itself."

The counsel for the appellant cited also from Washburn on Easements a general rule, expressed as follows: "This right of profit à prendre, if enjoyed by reason of holding certain other estate, is regarded in the light of an easement appurtenant to an estate; whereas, if it belongs to an individual, distinct from any ownership of other lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement in or out of the same."

The qualifications mentioned in these citations do not apply to the case at bar, for the reason before stated, that neither from the nature of the right, nor the terms of the grant, can it be affirmed that the right was enjoyed by reason of holding the farm, or on account of the estate. It is not like the case of a grant of land, with the right to take wood from other land for the benefit of the estate granted. Washb. Easem. 8; see also *Hill v. Lord*, 48 Me. 83; *Grimstead v. Marlowe*, 4 T. R. 717.

It may be inferred that the right reserved entered into the consideration for the conveyance of Pierce to the railroad company, but the case is destitute of any circumstance tending to establish an intention to affix the right as appurtenant to the remainder of the farm. The contiguous rights secured by the deed do not change the character of this. They are from their nature, appurtenant to the farm, and presumptively necessary to its enjoyment. This necessarily disposes of the defendant's claim of title to the wheat, through the title to this right obtained by the deed given upon the foreclosure.

The strip of land conveyed by Pierce to the railroad company was excepted and reserved from the referee's deed, and was not intended to be conveyed; and if the words, "as conveyed," were intended as an adoption of the terms of the deed by Pierce to the railroad company, yet the defendant would take nothing by the reservation to mow and cultivate, because, as we have seen, it was a reservation in favor of Pierce and wife personally, and would terminate upon the death of either. The uncertain character of this right to mow and cultivate, as reserved in the deed of Pierce, is significant also of an intention not to fasten it, as an enduring easement, to the remainder of the farm. The use of the strip for railroad purposes would operate to suspend or terminate the right at any time, and the railroad company would have the right at any time to determine the necessity of its use for such purposes, and hence the right is practically revocable at pleasure, and scarcely rises above the dignity of a personal license.

We concur with the views expressed at Special and General Term, and it is unnecessary to elaborate them. The judgment must be affirmed.¹⁴ All concur, except EARL, J., dissenting, and ALLEN, J., absent.

Judgment affirmed.

¹⁴ Distinguished: *Bennett v. Culver*, 27 Hun. 556. The right to take a part of the soil or produce of land, known as profit à prendre, requires a grant or

V. Rents ¹⁵

1. RENT CHARGE

CHURCH v. SEELEY.¹⁶

(Court of Appeals of New York, 1888. 110 N. Y. 457, 18 N. E. 117.)

Appeal from supreme court, general term, Third department.

Ejectment by Walter S. Church against John T. Seeley. Plaintiff is the owner of the rents reserved on two of the Van Rensselaer leases. He recovered, in 1881 and 1882, by actions of ejectment, the greater part of the land, took possession, and the time for redemption has expired. The total amount of rent due on the entire tracts was \$7,954.26, while on the portions held by defendant as assignee the amount due was found by the referee to be \$761.11, and this amount was stated in the judgment for plaintiff, from which he appeals. Code Civil Proc. N. Y. §§ 1504, 1505, 1507, 1516, provide that upon a grant reserving rent, where six months' rent shall be in arrear, and the grantor has the right to re-enter for non-payment, he may, without re-entry or demand, recover the premises by action. In case such right of re-entry is reserved upon default of goods sufficient to make the rent by distress, such action must be preceded by written notice of intention to re-enter. In such an action the rent due and in arrear must be fixed and stated in the judgment, if one be rendered. Where, in such action, there are more than one defendant, and they hold distinct parcels in severalty, the action may be divided into separate actions, and separate judgments rendered in each case.

FINCH, J. We agree with the general term in the result which it adjudged, and should adopt its opinion but for its discussion of a subject not necessarily involved in the case, and the soundness or unsoundness of which we ought not to determine in the present action. That opinion intimates that the effect of plaintiff's successful re-entry upon a part of the premises leased in fee may be to extinguish the rent upon the remainder. The defendant, however, makes no such claim, but concedes the plaintiff's right to re-enter upon such remainder for rent in arrear, and the whole controversy is simply what amount of such rent should be stated in the judgment as the basis of a possible redemption. The controversy therefore, proceeds upon the assumption that there is rent in arrear which should be stated in the judgment,

prescription from which a grant may be presumed. *Taylor v. Millard*, 118 N. Y. 251, 23 N. E. 376, 6 L. R. A. 667; 2 Wash. Real Prop. 276, 338; *Rapalje & Lawrence Law Dict.* title Profit. See also *Huntington v. Asher*, 96 N. Y. 610, 48 Am. Rep. 652.

¹⁵ For discussion of principles, see *Burdick*, Real Prop. § 181.¹⁶ Affirming 39 Hun, 269.

and that the amount is either the whole unpaid rent, treating the lease as an entirety, or the proportionate share of the 60 acres and of the 10 acres treating the rent as having been apportioned.

These manor leases have been held to create a rent-charge rather than a rent-service, and while at common law it was said that a rent-charge could not be apportioned because it issued out of the whole land, we have held that such an apportionment is possible by the concurring assent or action of both the landlord and the tenant. *Van Rensselaer v. Hays*, 19 N. Y. 76, 75 Am. Dec. 278; *Van Rensselaer v. Chadwick*, 22 N. Y. 34, 35. And so, the possibility existing, we are concerned only with the facts which are claimed to have effected an apportionment. The plaintiff recovered in ejectment 100 acres of lot 378, which contained the 60 acres additional involved in this action, as held under the lease to Martin Tubbs, and the day of redemption has passed. In like manner he recovered and holds the whole of lot 402, except the 10 acres owned by the defendant under the lease to Abbott & Russ, and which 10 acres, with the 60, constitute the lands in controversy.

The opinion of the general term points out very clearly the injustice of a rule which would permit a lessor in fee to have the bulk of the land, and at the same time all the rent in arrear, and suggests adequate reasons in support of a different result. The severance of the lease by the landlord in the pursuit of his remedy was preceded by long continued payments by the owners of the parcels in controversy measured by the proportion which their holdings bore to the full quantity of the two lots, and this had continued for many years. These pro rata payments were accepted by the lessor, and although credited, as is said upon the whole lease, as an entirety, do not appear to have been accepted upon that condition. And when that long course of dealing is followed by a re-entry upon a part of the land, leaving the defendant undisturbed in the possession of his 70 acres, it would seem as if a severance of the rent by the act and assent of the landlord was a reasonable and just inference. But beyond that the application and operation of the common law has been seriously affected by the statutory provisions for redemption, and those which seem to place it in the power of occupants of separate parcels to compel a severance of the action when the remedy sought is ejectment. It does not here appear that the severance relied upon was by compulsion, and against the will of the lessor, (Code Civil Proc. §§ 1504, 1505, 1507, 1516;) and treating it as voluntary, and in connection with the actual apportionment made and accepted, we think we are justified in affirming the judgment, without for the present going beyond the facts before us.

The judgment should be affirmed, with costs. All concur, except PECKHAM, J., not sitting.

2. GROUND RENTS

In re WHITE'S ESTATE.

(Supreme Court of Pennsylvania, 1895. 167 Pa. 206, 31 Atl. 569.)

Appeal from orphans' court, Franklin county.

Petition by Thomas Dallas and another for the partition of ground rents belonging to the estate of John White, deceased. The prayer of the petition was granted, and Martha White, widow of deceased, appeals. Affirmed.

The following is the opinion of the orphans' court:

"By a rule of property early established and consistently followed, ground rents in Pennsylvania are regarded as real estate. This rule was first declared in *Ingersoll v. Sergeant*, 1 Whart. 350, and it has been adhered to in all subsequent adjudications with respect to this species of property without any departure or variation. These adjudications were with reference to ground rents differing from those now under consideration in but a single particular. By the terms of the instruments under which these earlier rents were created, the grantee had the right to extinguish them by paying the grantor the capitalized sum of the annual charge upon a day certain or within a fixed period. His failure to exercise this right made the rent irredeemable thereafter. The rents in the present case are payable in half-yearly payments 'in every year hereafter, forever,' but are redeemable by the grantee 'at any time hereafter' by payment of the principal sum. Under this covenant the grantee can never be in default with respect to such payment, for it remains optional with him to make it; and hence, though by its terms it runs forever, it is yet a redeemable rent, and not repugnant to our recent legislation forbidding perpetual or redeemable rents.

"It is urged by those who oppose this proceeding on behalf of the widow of the decedent that this difference, however, is so radical, that it changes the character of the estate in the rent; that when redeemable it is not realty, but personalty,—a debt charged on the land. A sufficient answer to this is found in the fact that the circumstance of these rents being or becoming irredeemable did not contribute in the least to fixing their character as real property. What determined that was the conclusion reached by the court that they were a rent service, as distinguished from a rent charge. That they were the subject of an estate of inheritance resulted necessarily from this decision. And this estate is not changed by the fact that it is subject to be redeemed at the option of the grantee of the land, any more than real estate ceases to be real estate when its owner contracts to give another the option of the purchase. Indeed, such a contract will illustrate this case with respect to that feature of it we are asked to consider. The real estate which is the subject of the option remains real estate until the

option is exercised. The rule as stated by Pomeroy in his *Equity Jurisprudence* (volume 3, p. 132) is 'that in contracts of sale upon the purchaser's option the question whether or not a conversion is effected at all cannot, of course, be determined until the purchaser exercises his option; but the moment when he does exercise it the conversion as between the parties claiming title under the vendor relates back to the time of the execution of the contract.' It is discussed at length in *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526, and there unqualifiedly applied. What we are called upon to decide is the present character of these rents. The grantor is dead, intestate as to them. The grantee, as yet, has not exercised his option of purchase. They continue real estate, for purposes of descent, until he does. What they may become by payment of principal hereafter it is not necessary now to inquire. Sufficient unto the day.

"And now, 23d April, 1894, rule absolute: Inquest awarded."

PER CURIAM. The learned president of the orphans' court rightly held that for the purpose of distribution the ground rents in question must be treated as realty, and therefore subjects of partition. It is not our purpose, nor is it at all necessary, to add anything to what has been so well said by him in support of that position. On his opinion the decree is affirmed, and appeal dismissed, with costs to be paid by appellant.

PART III

MORTGAGES AND OTHER LIENS UPON REAL PROPERTY

MORTGAGES

(A) General Principles

I. Nature and Definition of a Mortgage¹

BARRETT v. HINKLEY.

(Supreme Court of Illinois, 1888. 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331.)

Appeal from superior court, Cook county; J. E. Gary, Judge.

Watson S. Hinkley, plaintiff, sued George D. Barrett, Adalina S. Barrett, and William H. Whitehead, impleaded with others, defendants, in ejectment. Judgment for plaintiff, and the above-mentioned defendants appealed.

MULKEY, J.² Watson S. Hinkley, claiming to be the owner in fee of the land in controversy, on the twenty-sixth day of February, 1885, brought an action of ejectment in the superior court of Cook county against the appellants, George D. Barrett, Adalina S. Barrett, William H. Whitehead, and others, to recover the possession thereof. There was a trial of the cause before the court without a jury, resulting in a finding and judgment for the plaintiff, and the defendants appealed. The evidence tends to show the following state of facts: In 1870, Thomas Kearns was in possession of the land, claiming to own it in fee-simple. On August 3d of that year he sold and conveyed it to William H. W. Cushman for the sum of \$80,000. Cushman gave his four notes to Kearns for balance of purchase money,—one for \$12,500, maturing in 30 days; three for \$16,875 each, maturing, respectively, in two, three, and four years after date,—and all secured by a mortgage on the premises. The notes seem to have all been paid but the last one. In 1878, Kearns died, and his widow, Alice Kearns, administered on his estate. Previous to his death, however, he had hypothecated the mortgage and last note to secure a loan from Greenebaum. Subsequently, and before the commencement of the present suit, Greenebaum, in his own right, and Mrs. Kearns, as administratrix of her husband, for value, sold and assigned by a separate instrument in writing the mortgage and note to the appellee, Watson S. Hinkley.

¹ For discussion of principles, see Burdick, Real Prop. § 184.

² Part of the opinion is omitted.

This is in substance the case made by plaintiff. The defendants showed no title in themselves or any one else. The conclusion to be reached, therefore, depends upon whether the case made by the plaintiff warranted the court below in rendering the judgment it did. * * * Thomas Kearns was the owner of this property in fee. He conveyed it in fee to Cushman. The latter, as a part of the same transaction, reconveyed it by way of mortgage to Kearns. By reason of this last conveyance Kearns became mortgagee of the property, and Cushman mortgagor. According to the English doctrine, and that of some of the states of the Union, including our own, Kearns, at least as between the parties, took the legal estate, and Cushman the equitable. According to other authorities, Kearns, by virtue of Cushman's mortgage to him, took merely a lien upon the property to secure the mortgage indebtedness, and the legal title remained in Cushman. For the purposes of the present inquiry, it is not important to consider just now, if at all, which is the better or true theory. It is manifest, and must be conceded, that the legal estate in the land, after the execution of the mortgage, was either in the mortgagee or mortgagor, or in both combined. Such being the case, it is equally clear appellee, to succeed, must have deduced title through one or both of these parties. This could only have been done by showing that the legal title had, by means of some of the legally recognized modes of conveying real property, passed from one or both of them to himself. This he did not do, or attempt to do; indeed, he does not claim through them, nor either of them. Not only so; neither Mrs. Kearns nor Greenebaum, through whom appellee does claim, derives title through any deed or conveyance executed by either the mortgagor or mortgagee; nor does either of them claim as heir or devisee of the mortgagor or mortgagee.

As the assignment of the note and mortgage to appellee did not, as we hold, transfer or otherwise affect the legal title to the land, it may be asked, what effect, then, did it have? This question, like most others pertaining to the law of mortgages, admits of two answers, depending upon whether the rules and principles which prevail in courts of equity or of law are to be applied. If the latter, we would say none; because, as to the note, that could not be assigned by a separate instrument, as was done in this case, so as to pass the legal title. *Ryan v. May*, 14 Ill. 49; *Fortier v. Darst*, 31 Ill. 213; *Chickering v. Raymond*, 15 Ill. 362. As to the mortgage, it is well settled that could not be assigned like negotiable paper, so as to pass the legal title in the instrument, or clothe the assignee with the immunity of an innocent holder, except under certain circumstances which do not apply here. *Railway Co. v. Loewenthal*, 93 Ill. 433; *Hamilton v. Lubukee*, 51 Ill. 415, 99 Am. Dec. 562; *Olds v. Cummings*, 31 Ill. 188; *McIntire v. Yates*, 104 Ill. 491; *Fortier v. Darst*, 31 Ill. 212. But that the mortgagee, or any one succeeding to his title, might, by deed in the form of an assignment, pass to the assignee the legal as well as the equitable interest of the mortgagee, we have no doubt, though there is some con-

flict on this subject. 2 Washb. Real Prop. 115, and authorities there cited. Yet the assignors, in the case in hand, not having the legal title, as we have just seen, could not, by any form of instrument, transmit it to another. If, however, the rules and principles which obtain in courts of equity are to be applied, we would say that, by virtue of the assignment, the appellee became the equitable owner of the note and mortgage, and that it gave him such an interest or equity respecting the land as entitled him to have it sold in satisfaction of the debt.

There is perhaps no species of ownership known to the law which is more complex, or which has given rise to more diversity of opinion, and even conflict in decisions, than that which has sprung from the mortgage of real property. By the common law, if the mortgagor paid the money at the time specified in the mortgage, the estate of the mortgagee, by reason of the performance of the condition therein, at once determined, and was forever gone, and the mortgagor, by mere operation of law, was remitted to his former estate. On the other hand, if the mortgagor failed to pay on the day named, the title of the mortgagee became absolute, and the mortgagor ceased to have any interest whatever in the mortgaged premises. By the execution of the mortgage, the entire legal estate passed to the mortgagee, and, unless it was expressly provided that the mortgagor should retain possession till default in payment, the mortgagee might maintain ejectment as well before as after default. This is the view taken by the common-law courts of England, and which has obtained, with certain limitations, in most of the states of the Union, including our own, in which the common-law system prevails. In *Carroll v. Ballance*, 26 Ill. 9, 79 Am. Dec. 354, which was ejectment by the mortgagee against the assignee of the mortgagor, to recover the mortgaged premises, this court thus states the English rule on the subject: "In England, and in many of the American states, it is understood that the ordinary mortgage deed conveys the fee in the land to the mortgagee, and under it he may oust the mortgagor immediately on the execution and delivery of the mortgage, without waiting for the period fixed for the performance of the condition, [citing *Coote, Mortg.* 339; *Blaney v. Bearce*, 2 Greenl. (Me.) 132; *Brown v. Cram*, 1 N. H. 169; *Hobart v. Sanborn*, 13 N. H. 226, 38 Am. Dec. 483; *Paper-Mills v. Ames*, 8 Metc. (Mass.) 1.] And this right is fully recognized by courts of equity, although liable to be defeated at any moment in those courts by the payment of the debt." Again, in *Nelson v. Pinegar*, 30 Ill. 481, which was a bill by mortgagee to restrain waste, it is said: "The complainant, as mortgagee of the land, was the owner in fee, as against the mortgagor and all claiming under him. He had the *jus in re*, as well as *ad rem*, and being so is entitled to all the rights and remedies which the law gives to such an owner." So, in *Oldham v. P'flegar*, 84 Ill. 102, which was ejectment by the heirs of the mortgagor against the grantee of the mortgagor, this court, in holding the action could not be maintained,

said: "Under the rulings of this court, the mortgagee is held, as in England, in law the owner of the fee, having the *jus in re*, as well as the *jus ad rem*." In *Finlon v. Clark*, 118 Ill. 32, 7 N. E. 475, the same doctrine is announced, and the cases above cited are referred to with approval. *Taylor v. Adams*, 115 Ill. 570, 4 N. E. 837.

Courts of equity, however, from a very early period, took a widely different view of the matter. They looked upon the forfeiture of the estate at law, because of non-payment on the very day fixed by the mortgage, as in the nature of a penalty, and, as in other cases of penalties, gave relief accordingly. This was done by allowing the mortgagor to redeem the land on equitable terms at any time before the right to do so was barred by foreclosure. The right to thus redeem after the estate had become absolute at law in the mortgagee was called the "equity of redemption," and has continued to be so called to the present time. These courts, looking at the substance of the transaction, rather than its form, and with a view of giving effect to the real intentions of the parties, held that the mortgage was a mere security for the payment of the debt; that the mortgagor was the real beneficial owner of the land, subject to the incumbrance of the mortgage; that the interest of the mortgagee was simply a lien and incumbrance upon the land, rather than an estate in it. In short, the positions of mortgagor and mortgagee were substantially reversed in the view taken by courts of equity.

These two systems grew up side by side, and were maintained for centuries without conflict or even friction between the law and equity tribunals by which they were respectively administered. The equity courts did not attempt to control the law courts, or even question the legal doctrines which they announced. On the contrary, their force and validity were often recognized in the relief granted. Thus, equity courts, in allowing a redemption after a forfeiture of the legal estate, uniformly required the mortgagee to reconvey to the mortgagor, which was of course necessary to make his title available in a court of law. In maintaining these two systems and theories in England, there was none of that confusion and conflict which we encounter in the decisions of the courts of this country; resulting chiefly, from a failure to keep in mind the distinction between courts of law and of equity, and the rules and principles applicable to them respectively. The courts there, by observing these things, kept the two systems intact, and in this condition they were transplanted to this country, and became a part of our own system of law.

But other causes have contributed to destroy that certainty and uniformity which formerly prevailed with us. Chiefly among these causes may be mentioned the statutory changes in the law in many of the states, and the failure of the courts and authors to note those changes in their expositions of the law of such states. Perhaps another fruitful source of confusion on this subject is the fact that in many of the states the common-law forms of action have been abolished by statute,

and instead of them a single statutory form of action has been adopted, in which legal and equitable rights are administered at the same time, and by the same tribunal. Yet the distinction between legal and equitable rights is still preserved, so that, although the action in theory is one at law, it is nevertheless subject to be defeated by a purely equitable defense. Under the influence of these statutory enactments and radical changes in legal procedure, by which legal and equitable rights are given effect and enforced in the same suit, the equitable theory of a mortgage has in many of these states entirely superseded the legal one. Thus, in New York it is said, in the case of *Trustees, etc., v. Wheeler*, 61 N. Y. 88, "that a mortgage is a mere chose in action. It gives no legal estate in the land, but is simply a lien thereon; the mortgagor remaining both the legal and equitable owner of the fee." Following this doctrine to its logical results, it is held by the courts of that state that ejectment under the Code will not be at the suit of the mortgagee against the owner of the equity of redemption. *Murray v. Walker*, 31 N. Y. 399. In strict conformity with the theory that the mortgagee has no estate in the land, but a mere lien as security for his debt, the courts of New York, and others taking the same view, hold that a conveyance by the mortgagee before foreclosure, without an assignment of the debt, is in law a nullity. *Jackson v. Bronson*, 19 Johns. (N. Y.) 325; *Wilson v. Troup*, 2 Cow. (N. Y.) 231, 14 Am. Dec. 458; *Jackson v. Willard*, 4 Johns. (N. Y.) 41. And this court seems to have recognized the same rule as obtaining in this state in *Delano v. Bennett*, 90 Ill. 533.

The New York cases just cited, and all others taking the same view, are clearly inconsistent with the whole current of our decisions on the subject, as is abundantly shown by the authorities already cited. The doctrine would seem to be fundamental that if one *sui juris*, having the legal title to land, intentionally delivers to another a deed therefor, containing apt words of conveyance, the title at law, at least, will pass to the grantee; but for what purposes or uses the grantee will hold it, or to what extent he will be able to enforce it, will depend upon circumstances. If the mortgagee conveys the land without assigning the debt to the grantee, the latter would hold the legal title as trustee for the holder of the mortgage debt. *Sanger v. Bancroft*, 12 Gray, (Mass.) 367; *Barnard v. Eaton*, 2 Cush. (Mass.) 304; *Jackson v. Willard*, 4 Johns. (N. Y.) 41. It is true, the interest which passes is of no appreciable value to the grantee. Thus, in the case last cited, Chancellor Kent, in speaking of it, says: "The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond." In *Wait's Actions and Defenses* (volume 4, p. 565) the rule is thus stated: "By the common law, a mortgagee in fee of land is considered as absolutely entitled to the estate, which he may devise or transmit by descent to his heirs." In conformity with this view, *Pomeroy*, in his work on

Equity Jurisprudence, (volume 3, p. 150,) in treating of this subject, says: "In law, the mortgagee may convey the land itself by deed, or devise it by will, and on his death intestate it will descend to his heirs. In equity, his interest is a mere thing in action, assignable as such, and a deed by him would operate merely as an assignment of the mortgage; and in administering the estate of a deceased mortgagee a court of equity treats the mortgage as personal assets, to be dealt with by the executor or administrator."

We have already seen that under the decisions of this court, and by the general current of authority, a mortgage is not assignable at law by mere indorsement, as in the case of commercial paper. But, on the other hand, the estate and interest of the mortgagee may be conveyed to the holder of the indebtedness, or even of a third party, by deed with apt words of conveyance; and the fact that it is in form an assignment will make no difference. 2 Washb. Real Prop. 115, 116. Such an assignee, if owner of the mortgage indebtedness, might, no doubt, maintain ejectment in his own name for his own use. Or the action might be brought in his name for the use of a third party owning the indebtedness. *Kilgour v. Gockley*, 83 Ill. 109. So, in this case, if the action had been brought in the name of Kearns' heirs for the use of Hinkley, no reason is perceived why the action might not be maintained.

It must not be concluded, from what we have said, that the dual system respecting mortgages, as above explained, exists in this state precisely as it did in England prior to its adoption in this country, for such is not the case. It is a conceded fact that the equitable theory of a mortgage has, in process of time, made in this state, as in others, material encroachments upon the legal theory which are now fully recognized in courts of law. Thus, it is now the settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate, as against all persons except the mortgagee or his assigns. *Hall v. Lance*, 25 Ill. 277; *Emory v. Keighan*, 88 Ill. 482. As a result of this doctrine it follows that, in ejectment by the mortgagor against a third party, the defendant cannot defeat the action by showing an outstanding title in the mortgagee. *Hall v. Lance*, *supra*. So, too, courts of law now regard the title of a mortgagee in fee in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the statute of limitations, the mortgagee's title is extinguished by operation of law. *Pollock v. Maison*, 41 Ill. 516; *Harris v. Mills*, 28 Ill. 44, 81 Am. Dec. 259; *Gibson v. Rees*, 50 Ill. 383. Hence the rule is well established at law, as it is in equity, that the debt is the principal thing, and the mortgage an incident.

So, also, while it is indispensable in all cases to a recovery in ejectment that the plaintiff show in himself the legal title to the property as set forth in the declaration, except where the defendant is estopped from denying it, yet it does not follow that because one has such title

he may under all circumstances maintain the action; and this is particularly so in respect to a mortgage title. Such title exists for the benefit of the holder of the mortgage indebtedness, and it can only be enforced by an action in furtherance of his interests; that is, as a means of coercing payment. If the mortgagee, therefore, should, for a valuable consideration, assign the mortgage indebtedness to a third party, and the latter, after default in payment, should take possession of the mortgaged premises, ejectment would not lie against him at the suit of the mortgagee although the legal title would be in the latter, for the reason it would not be in the interest of the owner of the indebtedness. In short, it is a well-settled principle that one having a mere naked legal title to land in which he has no interest, and in respect to which he has no duty to perform, cannot maintain ejectment against the equitable owner, or any one having an equitable interest therein, with a present right of possession.

This case, with a slight change of the circumstances, would afford an excellent illustration of the principle. Suppose the present plaintiff had obtained possession under his equitable title to the note and mortgage, and the heirs of Kearns, who had the legal title, had brought ejectment against him, the action clearly could not have been maintained, for the reasons we have just stated. But it does not follow, because such an action would not lie against him, that he could, upon a mere equitable title, maintain the action against others. *Cottrell v. Adams*, 2 Biss. 351-353, 9 Myers, Fed. Dec. 240, Fed. Cas. No. 3,272. The question in that case was almost identical with the question in this, and the court reached the same conclusion we have. See, also, *Speer v. Haddock*, 31 Ill. 439.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

II. Subject-Matter of Mortgage *

NELIGH v. MICHENOR.

(Court of Chancery of New Jersey, 1858. 11 N. J. Eq. 539.)

WILLIAMSON, Ch. In the year 1852 the complainant entered into several agreements in writing, with different individuals and with the Atlantic Land Company Association, for the purchase of several tracts of land in the county of Atlantic.

By the terms of the agreement, the several tracts were to be conveyed to him when the consideration money was paid. Under the agreements, he entered into possession. He then formed a partnership in business with John G. Michenor, one of the defendants. By

* For discussion of principles, see *Burdick*, Real Prop. § 186.

the terms of the partnership they were both to be equally interested in the several tracts of land embraced in the agreements. Michenor then entered into possession with the complainant. They made valuable improvements; and, on one of the tracts, erected a hotel, at a cost of upwards of fifty thousand dollars. On the 17th October, 1854, they made a settlement between them, and dissolved partnership. It was found, upon the settlement, that the complainant had made advances, most of which had been expended in the erection of the hotel and other improvements, to an amount exceeding thirteen thousand dollars. It was agreed, in the terms of the dissolution, that the complainant should convey to Michenor all his interest in the several tracts of land mentioned in the agreements; that Michenor should pay whatever remained due of the consideration money; that he should pay all the outstanding debts of the partnership, and should execute a mortgage upon the said land to secure the complainant that judgment of \$13,242.62, in five equal annual payments. The deed was executed, and delivered by the complainant to Michenor, and the latter executed and delivered the mortgage, as agreed upon. Michenor never procured any title to the land to be made to him; but with his consent, in the year 1854, conveyances were made to Charles Harlan, another of the defendants, who undertook to pay what remained due of the consideration money and some mechanic liens which were upon the hotel. It does not appear that there was any agreement in writing between the complainant and Harlan, and there is no evidence as to the particulars of the agreement upon which he received the conveyances.

The bill charges that although the deeds to Harlan are absolute on their face, it was understood that he should take the title merely to secure future advances; it alleges that the arrangement between Michenor and Harlan was fraudulent, and was made for the purpose of defeating the complainant's mortgage, and that Harlan had notice of the mortgage before he took the conveyances. The main object of the bill is to establish the mortgage as a lien upon the several tracts of land particularly described in it, and conveyed to Harlan, and the priority of the mortgage.

Harlan and Michenor have put in their answers to the bill separately. They both deny that Harlan took the conveyances to secure future advances, but allege that the title is absolute in him, and without any implied reservation in favor of Michenor. Michenor denies that he gave any notice to Harlan of the complainant's mortgage, and the latter denies that, at the time of the conveyances to him, or at the time he paid the consideration money, he had any knowledge whatever of the mortgage. And he denies the validity of the mortgage as a lien upon the property, even admitting he had notice.

Was this mortgage a valid mortgage? and did Harlan have notice of it? If these questions are answered in the affirmative, the com-

plainant is entitled to relief, leaving only one other question to be decided—whether the mortgage is entitled to priority over the advances made by Harlan.

The validity of this mortgage is denied, upon the ground that Michenor, the mortgagor, had not any such title to, or interest in, the land as was capable of being mortgaged. The complainant was the purchaser under agreements with the vendor under hand and seal, that they would convey to him the land, at a future day, upon his paying the consideration money expressed in the agreements. Has the purchaser, under such an agreement, an interest in the land which is the subject of mortgage? For if the complainant had an interest capable of being mortgaged, Michenor had also, for all the interest which the complainant had, he assigned and conveyed to Michenor.

In 2 Story, Eq. Jur. § 1021, it is said: "As to kinds of property which may be mortgaged, it may be stated that, in equity, whatever property, personal or real, is capable of an absolute sale, may be the subject of a mortgage. This is in conformity to the doctrine of the civil law—*Quod emptionem, venditionem que recipit, etiam pignorationem recipere potest*. Therefore rights in remainder and reversion, possibilities coupled with an interest, rents, franchises, and choses in action, are capable of being mortgages."

Everything which is the subject of a contract, or which may be assigned, is capable of being mortgaged. The right or interest which the complainant had in the lands was created by contract; and it was the valuable right of having a legal conveyance of the land, upon his complying with the terms of the contract. He had acquired an interest in the land, which could not be affected, or conveyed away by the vendor, without a fraud upon the vendor's rights. And a purchaser, who should have received a conveyance with knowledge of the existing agreement, would have been held, in equity, as the vendor himself was in fact, a mere trustee for the complainant. Equity considers the vendor as a trustee for the vendee of the real estate, and the vendee as a trustee for the vendor of the purchase money. The vendee is so far treated as the owner of the land that it is devisable and descendible as his real estate, and the money is treated as the personal estate of the vendor, and goes to his personal representatives at his death. 2 Story, Eq. Jur. § 112. There cannot be a doubt that such an interest as the complainant had under his contracts for purchase, and which he assigned to Michenor, is capable of being mortgaged. It is the subject of an equitable lien or trust, which a court of equity will enforce and protect. Interests in property are protected by courts of equity which are not recognized at law as valid or effectual as subject matters of legal conveyances or assignments. 1 Pow. Mortg. 17, in enumerating the things which are capable of being mortgaged, says: "Everything which may be considered as property, whether, in the technical language of the law, denominated real or

personal property, may be the subject of a mortgage. Advowsons, rectories and tithes may be the subject of a mortgage. Reversions and remainders, being capable of grant from man to man, are mortgageable. Possibilities, also, being assignable, are mortgageable, a mortgage of them being only a conditional assignment." A tenant at will has not such an estate or property in lands as can be mortgaged, but any estate in fee simple, fee tail, for life or years, in any lands, or in any rent or profit out of the same, may be mortgaged. 1 Pow. Mortg. 18.

The case of *Parkist v. Alexander*, 1 Johns. Ch. (N. Y.) 394, was, in its leading features, very similar to the present case, and its decision necessarily involved the question we are now considering. Tucker made a parol agreement with Alexander, who acted as agent for Ellis, the owner of the property, for a lease to Tucker, in fee, for a lot of land, subject to the annual rent of three pounds. Parkist, the complainant in the suit, purchased Tucker's right, and took possession of the premises, and made valuable improvements. He then sold the premises to McKnight, and gave him a quit-claim deed; and, to secure the payment of the purchase money, took his bond and mortgage, which was duly recorded. Alexander procured the lease from Ellis, the owner of the premises, and then McKnight conveyed to Alexander for \$700. The answer denied that Alexander had any notice of the mortgage. The chancellor sustained the mortgage, and decided that the registry of it was notice to a subsequent bona fide purchaser. It will be observed, that when McKnight mortgaged the premises, he had no other interest in them than the assignment of Parkist's right, under a verbal agreement for a lease between Tucker and the agent of Ellis, the owner, and the right to which lease Parkist had purchased of Tucker. The interest which the mortgagee had in the land was an interest similar to that which Michenor had when he mortgaged to the complainant. McKnight had a right for a lease in fee, subject to the payment of an annual rent. If an interest like that was capable of being mortgaged, then surely Michenor, who had a right to a conveyance in fee, had such an interest as would support a mortgage. The mere fact of all the consideration money not having been paid, cannot affect the question, whether his interest was such as could be mortgaged. I think that Michenor had an interest capable of being mortgaged, and that it created a valid lien upon the land subject to the rights of the vendor under the agreement.

Did Harlan have notice of the mortgage? The mortgage was duly recorded. It is insisted that the registry was notice. It does appear to me, notwithstanding the decision of *Parkist v. Alexander*, that the registry of such a mortgage ought not to be considered as notice. If it is notice, it is notice to all the world. Now if Leeds, one of the persons with whom the complainant made an agreement to purchase, had sold the premises to a bona fide purchaser without actual notice

of this mortgage, would such purchaser have been affected by the registry of such equitable mortgage? The agreement was not recorded. There was no authority to record it. A bona fide purchaser would not be affected by such agreement. If not, could he be affected by the registry of a mortgage executed by the vendee of such agreement? The object of the registry is to give notice to subsequent purchasers. But the registry of a mortgage like this is no protection. The title upon the record was in Leeds, and finding the title in him, a person who went to the record to search for encumbrances upon the premises would have no intimation that it was necessary to search in the name of Michenor. There was nothing upon the record to show that he had any interest in the land, or to give him any clue whatever to this mortgage; and if he was required to search for such a mortgage, then he would be obliged to search them through every name to be found in the registry books.

But I do not deem it necessary to decide this point. I think it is proved, beyond all dispute, that Harlan had actual notice of this mortgage. In his petition to open the decree *pro confesso*, which was obtained against him in this cause, and which is under oath, he says that on or about the 25th of May, 1855, he took a deed from Charles Leeds and wife for the land embraced in their agreement with the complainant; that, on the 19th day of May, 1855, Hackett and wife executed a deed to him for the land embraced in their agreement with the complainant, which was delivered on or about the 25th of May, 1855, and that the Camden and Atlantic Land Company executed a deed to him on the 27th of April, 1855, for the land mentioned in their agreement with the complainant, but which was not delivered until the first of the month of June, 1855. In his answer, he states that before he had any knowledge or notice whatever of the complainant's mortgage, he had not only made the agreement with Michenor, and paid the money for the property, but that he had obtained the title deeds for the property before such knowledge.

He further states that some person, some time in the spring of 1855, brought to him a mortgage purporting to be given by Michenor to the complainant, and said to cover the property, or some part thereof, purchased by him, but whether it did so cover it or not, he cannot positively say, but that prior to that time his agreement with Michenor had been made and consummated, the money paid, and the deeds all been executed, and that the deeds from Hackett and wife and Leeds and wife had been actually delivered, and that he thinks and believes that the deed from the Camden and Atlantic Land Company had also been delivered. In his petition he states that the first information or knowledge he ever had that there was any such mortgage or agreement between the complainant and Michenor was some time after the deeds had been executed and delivered, and the purchase money, in full, paid, and that such information was given to

him by Judge Carpenter, the counsel of Michenor, which was some time after the deed from the land company had been made, and was on the day, and at the time, the purchase money was paid, and the deed of the company delivered.

It is possible, with some difficulty, to reconcile the discrepancies between the petition and the answer with a disposition to tell the truth; but the evidence so completely disproves the statements of both, as to render such an attempt altogether unnecessary and unavailing.

James H. Castle says that in May, 1855, between the 10th and 15th, the complainant placed the mortgage in his hands to sell for him, and requested him to make application to Harlan; that on or about the 20th of May, he laid the mortgage before Harlan; that he spent some time with him about the matter; that Harlan examined the papers carefully, and took a memorandum of the property, and the dates of the mortgage, &c.; that he examined the map, and when they separated said he would see witness again upon the subject; that on the next day he called and asked to look at the papers, which were shown him, when he remarked that the mortgage was not worth the paper on which it was written. Witness says, in consequence of Harlan's remark, he went to the complainant, and told him he had better take legal counsel, and recommended Judge Carpenter. Judge Carpenter testifies, refreshing his memory from an entry in his docket, that the complainant retained him on the 25th of May, and then placed the mortgage in his hands. There was no one of the deeds delivered, and no money paid before the 25th of May. Harlan so states in his answer and his petition. So that it is proved that before he received a deed, or paid any money, he had full notice of the mortgage.

Isaac Loyd testifies that he was the secretary and treasurer of the Camden and Atlantic Land Company; that the deed from that company to Harlan was delivered by the witness to Harlan on the 8th of June, 1855, and at that time he received from him the purchase money. The witness further testifies that Judge Carpenter requested him to give notice to Harlan of the mortgage before its delivery; that he gave him the notice, and that Harlan made no reply, but smiled as though he knew all about it, and as if it was of no consequence.

The evidence establishes the fact that Harlan had actual notice of the complainant's mortgage before his purchase.

It appears that, at the time of Harlan's purchase, there was due and payable to the grantors, for purchase money upon their several agreements the sum of five thousand two hundred and eighty-one dollars, and that this amount was paid by Harlan. He also made other advances to satisfy encumbrances upon the property. Under ordinary circumstances, these payments would have been decreed existing liens upon the property in the hands of Harlan, having priority over the complainant's mortgage. Although Michenor, in his agreement with

the complainant, was bound to pay the purchase money, it appears he was unable to do so. It was necessary the money should be paid, or the title of the vendee under the agreement would have been forfeited. The payment of this money, therefore, was necessary in order to complete the title which supports the mortgage. If a third person, under such circumstances, had advanced the money in order to prevent a forfeiture of the vendee's rights under the agreement, I think it would have been equitable that he should be reimbursed. But Harlan claims no such equity. He does not pretend that he paid the money for the purpose of protecting the mortgage. On the contrary, he is detected in an attempt to deprive the complainant of his security. His object was to defeat the mortgage; and having been thwarted in this unlawful purpose, he has no claim whatever to the interference of this court for his protection. He must stand upon his legal rights.

There was an objection made, that at the time of filing the bill there was no default of payment of anything due upon the mortgage. If such were the fact, the complainant had a right, under the circumstances, to file his bill to protect his lien. That being established, he has now a right to have it enforced for whatever may be due upon it at the time of the decree.

There must be a reference to a master to take an account of what is due upon the mortgage and upon the other encumbrances, which appear, by the pleadings, to be undisputed. In taking the account, Michenor will have an opportunity of showing what credit he is entitled to upon the mortgage, and for that purpose the master can use the depositions already taken, and may take such other testimony as the parties may see proper to offer.

PLATT v. NEW YORK & S. B. RY. CO.

(Supreme Court of New York, Appellate Division, Second Department, 1896.
9 App. Div. 87, 41 N. Y. Supp. 42.)

Appeal from special term, Kings county.

Action by William O. Platt and another, as trustees, against the New York & Sea Beach Railway Company and Sophia M. Onderdonk, to foreclose a mortgage. From an order denying the petition of August Meidling, Jr., a judgment creditor of defendant railway company, to vacate an order appointing a receiver, and also a judgment entered in the action or to modify the same, petitioner appeals. Affirmed.

Argued before BROWN, P. J., and CULLEN, BARTLETT, and HATCH, JJ.

HATCH, J. The validity of the mortgage is not controverted. But it is claimed that under it no lien was acquired upon the personal prop-

erty purchased subsequent to its execution as against the petitioner herein. That the lien should attach to after-acquired property is within the express terms of the mortgage, and it is not disputed that such is its effect as between the parties thereto. By the provisions of the statute (Laws 1850, c. 140, § 10), authority was conferred to mortgage the corporate property and franchises for the purpose of completing, furnishing, or operating the railroad; and this authority has been continued in the same language under the revision of the railroad law (Laws 1892, c. 676, § 4, subd. 10). The statute contemplates that it may be necessary to borrow money for the purpose of the physical creation of the road and putting it in operation. It is quite evident that in the accomplishment of this purpose property would be created and acquired that had no actual or potential existence at the time when the loan was made and the mortgage given. It is the usual course of procedure in the construction of a railroad that money is raised by mortgage upon its property, and that the structure is built and operated to a large extent by means of the loans thus obtained, and much of the property is created and acquired after the loan is made. The statute makes no distinction between property necessary for the completion and furnishing of the road and that which is essential to its operation. By the terms of the law, therefore, it was contemplated that for the money thus obtained the property acquired should be pledged as the security for its repayment, and this cannot be accomplished without holding that the lien of the mortgage attaches to such property as shall be necessary for that purpose, whether in existence at the time when the mortgage is given or is subsequently acquired, and whether such property be such as is denominated "real" or "personal." So it was early held that such a mortgage created, in equity, a lien upon property subsequently acquired superior to the lien of a subsequent incumbrancer by mortgage or judgment. *Seymour v. Railroad Co.*, 25 Barb. 284; *Benjamin v. Railroad Co.*, 49 Barb. 447; *Stevens v. Watson*, 4 Abb. Dec. 302. In those cases the question arose respecting liens upon subsequently acquired real property. But the discussion shows that the court considered the rule applicable as well to personal as to real property. Such has been the uniform rule applied in the federal courts. *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673; *Trust Co. v. Kneeland*, 138 U. S. 419, 11 Sup. Ct. 357, 34 L. Ed. 1014.

The difficulties which have arisen relate not so much to the recognition of the mortgage as a lien, for the doctrine of the above-cited cases has never been questioned, but rather to the steps necessary to be taken to evidence the lien. The first debate arose over the question whether the rolling stock and equipment of the road retained its character as personal property, and, if so, was it requisite that it should be filed as a mortgage of chattels. The supreme court divided upon the question, and decisions were rendered both ways. The court of

appeals in *Hoyle v. Railroad Co.*, 54 N. Y. 314, 13 Am. Rep. 595, settled the question by holding that it was personal property, and that the mortgage covering it must be filed as a mortgage of chattels, as prescribed by the act of 1833, or the same would be void as against the general creditors of the corporation. To meet this conclusion, the legislature in 1868 passed an act (Laws 1868, c. 779), providing that it shall not be necessary to file such mortgage as a mortgage of chattels when it covers real and personal property, and is recorded as a mortgage of real estate in each county in or through which the railroad runs. By this act the status of such property, so far as it relates to liens by way of mortgage, is made practically subject to the same rules, and is placed upon the same footing, as real property. The business carried on by railroads, the great extent of territory which they cover, and the fact that the rolling stock is at all times widely distributed, not only throughout the state through which its lines mainly run, but also throughout the different states of the Union, creates an essential difference between it and property whose situs is practically fixed. This, coupled with the necessity which exists for certainty of security to those advancing money, usually in very large amounts, upon the faith of railroad property, and the practical difficulty, if not impossibility, of a railroad being able to realize upon its property in this manner, if the technical rules respecting liens upon personal property should obtain, evidently created an intent in the mind of the legislature to make such property subject to the same rules, so far as practicable, as apply to liens upon real property. It is quite evident that, if it should be held necessary to constantly revise such a mortgage, in order to cover what has been, it may be, purchased by the money advanced or to supply operating needs, and replenish what is destroyed, it would render such security so doubtful and precarious as not only to impair, but to practically destroy, its value.

We can see no reason for drawing a distinction in this regard between real and personal property. On the contrary, as the authority for the mortgage of both is derived from the same source, and the same reasons exist why both should be available and answerable as security, we think it more in harmony with the legislative intent to subject it to the same rules. *New York Security & Trust Co. v. Saratoga Gas & Electric Light Co.*, 88 Hun, 569, 34 N. Y. Supp. 890. This view does not bring us in conflict with *Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 635. That case proceeded upon the well-settled legal rule that a mortgage of chattels having no actual or potential existence when the mortgage was given is void as to intervening creditors. For reasons already stated, that rule has no application to a mortgage of this character.

It follows that the order appealed from should be affirmed, with \$10 costs and disbursements. All concur.

III. Form of Mortgages *

1. DEFEASANCE IN SEPARATE INSTRUMENT

COOK v. BARTHOLOMEW.

(Supreme Court of Errors of Connecticut, 1891. 60 Conn. 24, 22 Atl. 444.
13 L. R. A. 452.)

Case reserved from court of common pleas, Litchfield county.

CARPENTER, J. This is a suit for the foreclosure of a mortgage, with the alleged mortgage annexed as an exhibit. The mortgage is in two parts,—an ordinary deed for the consideration of \$900, duly executed to convey real estate, and a condition thereto attached, of the same date, and signed by the grantor, as follows: "The condition of the within deed is as follows: The said Bostwick, for the consideration named in the within deed, covenants and agrees with said Charles Cook, as such conservator, that he will receive said Sarah A. Bostwick into his care and keeping during the term of her natural life; that he will provide for all her wants in a reasonable and proper way; will provide her with all needed food, drink, and clothing; have a room and fire when needed; lodging and every necessary comfort, both in sickness and health; and at her decease give her decent and proper burial, and erect tombstones at her grave, with a suitable inscription thereon, within one year after her decease, said tombstones to be of a value of not less than fourteen dollars. Now, therefore, if said Bostwick shall well and truly perform all and every of the above covenants and stipulations faithfully, then this deed to be void; otherwise to remain in full force and effect in law." The complaint also alleges that the defendant Bostwick subsequently conveyed his interest in the premises to the defendant Jones, and that Jones conveyed his interest to the other defendant, Bartholomew. The defendants demurred, and the case is reserved.

Whether the instrument sued on is or is not a mortgage is the principal question in the case. What is a mortgage? "A mortgage is a contract of sale executed, with power to redeem. * * * The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing any other act. The most common method is to insert the condition in the deed, but it may as well be done by a separate instrument of defeasance executed at the same time. * * * A bond or note is usually taken for the debt, which is described in the deed with a condition that if the debt is paid by the time the deed shall be void. In such case the mortgage is called a collateral security for the debt. In like manner an engagement to indemnify

* For discussion of principles, see Burdick, Real Prop. § 187.

nify, or any other agreement, may be described in the mortgage deed." 2 Swift, Dig. 182, 183. "To constitute a mortgage, the conveyance must be made to secure the payment of a debt." Bacon v. Brown, 19 Conn. 29. "A conveyance of lands by a debtor to a creditor as a security for the payment of the debt." Jarvis v. Woodruff, 22 Conn. 548. What is a debt? "That which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another or to perform for his benefit; that of which payment is liable to be exacted; due; obligation; liability." Webster. Dict. What is this case? Ammon Bostwick received \$900 from the plaintiff, in consideration of which he agreed to support Sarah A. Bostwick during life, and at her death to bury her, and to erect a tombstone to her memory. To secure the performance of this agreement, he executed this deed, with a condition that the deed should be void if the agreement should be performed. He assumed a duty, which may be aptly described as a debt. He executed a deed of real estate as collateral security for the performance of that duty,—the payment of that debt. The obligation falls within an approved definition of "debt," and the conveyance is within the legal definition of a "mortgage."

There is no force in the objection that this cannot be a mortgage because of the difficulty in ascertaining the amount of the debt, as clearly appears by the definitions. Of course, there is less certainty and more inconvenience in reducing an obligation of this nature to a money valuation than there is in computing the amount due on an ordinary bond or note. Nevertheless it may be approximately done, and that is sufficient for all the purposes of substantial justice. Courts never refuse to redress an injury on account of the difficulty in estimating the extent of the injury in dollars and cents. In this case the age, health, general condition, and expectation of life of Sarah A. Bostwick must be known. Add to these the probable cost of supporting her for one year, and we have the data for a reasonable estimate of the cost of supporting her through life. It is a problem of the same nature, containing the same elements and similar factors, with the problem which the parties solved 14 years ago. They then, as it seems, fixed the outside limit at \$900. The same thing can be done now as well as then. Possibly \$900 may be considered an equitable limit, beyond which the plaintiff may not claim in this case.

As other circumstances may exist which will materially affect the general question, we will not consider the question further on this demurrer. Regarding the conveyance as a mortgage, as we do, there is no foundation for the claim that an entry for a breach of the condition is essential. An entry is essential when the grantor would divest the grantee of his title for a breach of a condition. This is an action by the grantee, in whom the title is, not to enforce a forfeiture, but to foreclose an equity of redemption, unless the grantor, within a rea-

sonable time allowed him therefor, pays the damage sustained by a breach of his agreement.

The court of common pleas is advised to overrule the demurrer. The other judges concur.⁵

2. DEED ABSOLUTE ON FACE

PEUGH v. DAVIS.

(Supreme Court of United States, 1877. 96 U. S. 332, 24 L. Ed. 775.)

Appeal from the Supreme Court of the District of Columbia.

This was a suit in equity brought June 28, 1869, to redeem certain real property in Washington City. The defence consisted in an alleged release of the equity of redemption, to establish which, in addition to the testimony of the parties, the defendant relied principally upon the following papers:—

“Whereas the undersigned, Samuel A. Peugh, of the city of Washington, in the District of Columbia, having heretofore sold and conveyed to Henry S. Davis, of the said city, two certain squares of ground in said city, the same being squares numbered nine hundred and ten (910) and nine hundred and eleven (911) in the said city, the said sale and conveyance having been by the said Peugh made with full assurance and promise of a good and indefeasible title in fee-simple, though the said conveyance contains only a special warranty, the said conveyance to said Davis bearing date on the fourth day of March, A. D. 1857, and being recorded on the seventh day of September, A. D. 1857.

“And whereas the title to the said squares so conveyed as aforesaid to said Davis having been now questioned and disputed, the said Peugh doth now, for himself, his heirs, executors, and administrators, promise, covenant, and agree to and with the said Henry S. Davis, his heirs and assigns, in the manner following; that is, that he, the said Samuel A. Peugh, and his heirs shall and will warrant and for ever defend the said squares of ground and appurtenances as conveyed, as aforesaid, unto the said Henry S. Davis, his heirs and assigns, from and against the claims of all persons whomsoever.

“And, further, that the said Peugh, and his heirs, executors, and administrators, shall and will pay and refund to said Davis, his heirs or assigns, all and singular the loss, costs, damage, and expenses, including the consideration in said deed or conveyance, which or to which the said Davis, his heirs or assigns, shall lose, incur, pay, or be subject

⁵ And see, further, *French v. Case*, 77 Mich. 64, 43 N. W. 1056 (1889); *Day v. Towns*, 76 N. H. 200, 81 Atl. 405 (1911), damages for breach of covenant to furnish a “home.” See, also, *Powers v. Mastin*, 62 Vt. 433, 20 Atl. 105 (1890), holding that, where there is no specification as to where the support shall be furnished, it is the right of the mortgagee to appoint a reasonable place.

to, by reason of any claim or litigation against or on account of said squares of ground, or either of them.

"And for the full and faithful observance and performance of all the covenants and agreements aforesaid, and for the payment of all the sum or sums of money as therein provided, in the manner prescribed as aforesaid, the said Samuel A. Peugh doth hereby bind himself, his heirs, executors, and administrators, and each and every of them, firmly by these presents.

"In testimony whereof, the said Samuel A. Peugh doth hereto so set his hand and seal on this ninth day of February, in the year of our Lord 1858.

S. A. Peugh. [Seal.]

"Signed, sealed, and delivered in the presence of

"Francis Mohun.

"Wm. H. Ward."

"Washington, D. C., Feb. 9, 1858.

"Received of Henry S. Davis \$2,000, the same being in full for the purchase of squares Nos. 910 and 911 in the city of Washington.

"\$2,000.

S. A. Peugh."

The other facts sufficiently appear in the opinion of the court.

The decree at special term dismissing the bill was at general term affirmed; and the complainant appealed to this court.

Mr. Justice FIELD delivered the opinion of the court.

This is a suit in equity to redeem certain property, consisting of two squares of land in the city of Washington, from an alleged mortgage of the complainant. The facts, out of which it arises, are briefly these: In March, 1857, the complainant, Samuel A. Peugh, borrowed from the defendant, Henry S. Davis, the sum of \$2,000, payable in sixty days, with interest at the rate of three and three-fourths per cent a month, and executed as security for its payment a deed of the two squares. This deed was absolute in form, purporting to be made upon a sale of the property for the consideration of the \$2,000, and contained a special covenant against the acts of the grantor and parties claiming under him. This loan was paid at its maturity, and the deed returned to the grantor.

In May following, the complainant borrowed another sum from the defendant, amounting to \$1,500, payable in sixty days, with the same rate of interest, and as security for its payment redelivered to him the same deed. Upon this sum the interest was paid up to the 6th of September following. The principal not being paid, the defendant placed the deed on record on the 7th of that month. In January, 1858, a party claiming the squares under a tax title brought two suits in ejectment for their recovery. The defendant thereupon demanded payment of his loan, as he had previously done, but without success.

On the 9th of February following, the complainant obtained from the defendant the further sum of \$500, and thereupon executed to him an instrument under seal, which recited that he had previously sold and

conveyed to the defendant the squares in question; that the sale and conveyance were made with the assurance and promise of a good and indefeasible title in fee-simple; and that the title was now disputed. It contained a general covenant warranting the title against all parties and a special covenant to pay and refund to the defendant the costs and expenses, including the consideration of the deed, to which he might be subjected by reason of any claim or litigation on account of the premises. Accompanying this instrument, and bearing the same date, the complainant gave the defendant a receipt for \$2,000, purporting to be in full for the purchase of the land.

The question presented for determination is whether these instruments, taken in connection with the testimony of the parties, had the effect of releasing the complainant's equity of redemption. It is insisted by him that the \$500 advanced at the time was an additional loan, and that the redelivered deed was security for the \$2,000, as it had previously been for the \$1,500. It is claimed by the defendant that this money was paid for a release of the equity of redemption which the complainant offered to sell for that sum, and at the same time to warrant the title of the property and indemnify the defendant against loss from the then pending litigation.

It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity: it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice. *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142; *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Taylor v. Luther*, 2 Sumn. 228, Fed. Cas. No. 13,796; *Pierce v. Robinson*, 13 Cal. 116.

It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from

which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed.

A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor. Especially is this necessary, as was said on one occasion by this court, when the creditor has shown himself ready and skilful to take advantage of the necessities of the borrower. *Russell v. Southard*, *supra*. Without citing the authorities, it may be stated as conclusions from them, that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding.

If, now, we apply these views to the question before us, it will not be difficult of solution. It is admitted that the deed of the complainant was executed as security for the loan obtained by him from the defendant. It is, therefore, to be treated as a mortgage, as much so as if it contained a condition that the estate should revert to the grantor upon payment of the loan. There is no satisfactory evidence that the equity of redemption was ever released. The testimony of the parties is directly in conflict both being equally positive,—the one, that the advance of \$500 in February, 1858, was an additional loan; and the other, that it was made in purchase of the mortgagor's interest in the property. The testimony of the defendant with reference to other matters connected with the loan is, in several essential particulars, successfully contradicted. His denial of having received the instalments of interest prior to September, 1857, and his hesitation when paid checks for the amounts with his indorsement were produced, show that his recollection cannot always be trusted.

Aside from the defective recollection of the creditor, there are several circumstances tending to support the statement of the mortgagor. One of them is that the value of the property at the time of the alleged release was greatly in excess of the amount previously secured with the additional \$500. Several witnesses resident at the time in Washington, dealers in real property, and familiar with that in controversy and similar property in its vicinity, place its value at treble

that amount. Some of them place a still higher estimate upon it. It is not in accordance with the usual course of parties, when no fraud is practised upon them and they are free in their action, to surrender their interest in property at a price so manifestly inadequate. The tax title existed when the deed was executed, and it was not then considered of any validity. The experienced searcher who examined the records pronounced it worthless, and so it subsequently proved.

Another circumstance corroborative of the statement of the mortgagor is, that he retained possession of the property after the time of the alleged release, enclosed it, and either cultivated it or let it for cultivation, until the enclosure was destroyed by soldiers at the commencement of the war in 1861. Subsequently he leased one of the squares, and the tenant erected a building upon it. The defendant did not enter into possession until 1865. These acts of the mortgagor justify the conclusion that he never supposed that his interest in the property was gone, whatever the mortgagee may have thought. Parties do not usually enclose and cultivate property in which they have no interest.

The instrument executed on the 9th of February, 1858, and the accompanying receipt, upon which the defendant chiefly relies, do not change the original character of the transaction. That instrument contains only a general warranty of the title conveyed by the original deed, with a special covenant to indemnify the grantee against loss from the then pending litigation. It recites that the deed was executed upon a contract of sale contrary to the admitted fact that it was given as security for a loan. The receipt of the \$2,000, purporting to be the purchase-money for the premises, is to be construed with the instrument, and taken as having reference to the consideration upon which the deed had been executed. That being absolute in terms, purporting on its face to be made upon a sale of the property, the other papers referring to it were drawn so as to conform with those terms. They are no more conclusive of any actual sale of the mortgagor's interest than the original deed. The absence in the instrument of a formal transfer of that interest leads to the conclusion that no such transfer was intended.

We are of opinion that the complainant never conveyed his interest in the property in controversy except as security for the loan, and that his deed is a subsisting security. He has, therefore, a right to redeem the property from the mortgage. In estimating the amount due upon the loan, interest only at the rate of six per cent per annum will be allowed. The extortionate interest stipulated was forbidden by statute, and would, in a short period, have devoured the whole estate. The defendant should be charged with a reasonable sum for the use and occupation of the premises from the time he took possession in 1865, and allowed for the taxes paid and other necessary expenses incurred by him.

The decree of the Supreme Court of the District must be reversed, and the cause remanded for further proceedings, in accordance with this opinion; and it is so ordered.

MOONEY v. BYRNE.

(Court of Appeals of New York, 1900. 163 N. Y. 86, 57 N. E. 163.)

Appeal from supreme court, appellate division, Second Department.

Action by Mary J. Mooney against Anastasia Byrne and others. From a judgment of the appellate division in favor of defendants (15 App. Div. 624, 44 N. Y. Supp. 1124), plaintiff appeals. Reversed.

VANN J. The case made by the complaint was that of a mortgagor with a right to redeem from a mortgagee or his devisees in possession. The defendants denied that there was any mortgage, alleged an absolute conveyance from the plaintiff to one Owen Byrne, and a subsequent conveyance from the latter to a bona fide purchaser. They also pleaded the statute of limitations, and specified the period of six and ten years as the limit exceeded by the plaintiff in bringing her action. The facts agreed upon by the parties and admitted by the pleadings are in substance as follows:

On the 14th of August, 1878, the plaintiff owned and was in possession of a parcel of land in the city of New York worth \$10,000 and upward, and at the same time she was indebted to Owen Byrne in the sum of about \$3,000, secured by three mortgages on said premises, which were under process of foreclosure. In order to secure the payment of this indebtedness she conveyed the land to said Byrne at his request by a deed dated on the day last named and duly recorded. "The said deed was given as security," and for no other purpose. It contained full covenants, subject to said mortgages, which, as it was declared, "shall not merge in the fee, but shall remain valid and subsisting liens." Said Byrne at the same time gave back a defeasance of even date, whereby he agreed to reconvey to the plaintiff upon the payment to him, within one year, of said indebtedness, certain advances which he agreed to make for her benefit, and the costs of the foreclosure proceedings. It was stipulated that she should be relieved from personal liability on the bonds, and that no judgment for deficiency should "be claimed or entered against her in any action that may be taken upon said bonds or mortgages, so long as she and all persons claiming under her shall not dispute or contest the title of the" said Byrne "or his assigns to said mortgaged premises, or the amounts due him on said mortgages. * * *" Said instrument also provided "that, as to the agreement by the" said Byrne "to reconvey said premises, time is of the essence thereof, and, further, that this instrument shall not be recorded by or on behalf of the" plaintiff, "and that for a violation of this provision, this agreement,

so far as the same provides for such reconveyance, shall thereupon become utterly null and void." The defeasance was never recorded. Said Byrne at once took possession of the premises, and remained in possession thereof until the 13th of June, 1881, when he conveyed to one Walker by a deed duly recorded, but "said conveyance was made without the consent of the plaintiff, who had no knowledge of it until this action was begun" on the 7th of March, 1895.

Said Byrne died on the 11th of January, 1889, leaving a will by which he gave all his property, real and personal, to the defendants. His executor accounted, and has been discharged, and the property of the testator has been delivered to the defendants. The plaintiff claimed that the rents and profits of the premises received by Byrne amounted to more than the principal and interest of the debt secured. She alleged in her complaint that, if Byrne had conveyed the premises to any one, such conveyance was made without her knowledge or consent. She demanded an accounting as to the amount due from her, and that she might "be at liberty to redeem said mortgaged premises upon payment of whatever may upon such accounting be found due, which this plaintiff hereby offers to pay," and that the defendants be compelled to convey said premises to her. She also demanded alternative and general relief. Said Walker, who still owns the premises, was not made a party to the action. The trial judge dismissed the complaint upon the ground that "the statute of limitations is a conclusive defense," and the appellate division affirmed, on an opinion rendered in overruling a demurrer to the answer, when the case was in the First department. 15 App. Div. 624, 44 N. Y. Supp. 1124; and 1 App. Div. 316, 37 N. Y. Supp. 388.

The facts agreed upon show that there was a mortgage; for a deed, although absolute on its face, when given as security only, is a mortgage by operation of law. *Horn v. Keteltas*, 46 N. Y. 605; *Meehan v. Forrester*, 52 N. Y. 277; *Odell v. Montross*, 68 N. Y. 499; *Barry v. Insurance Co.*, 110 N. Y. 1, 5, 17 N. E. 405; *Kraemer v. Adelsberger*, 122 N. Y. 467, 25 N. E. 859; *Macauley v. Smith*, 132 N. Y. 524, 30 N. E. 997; 15 Am. & Eng. Enc. Law, 791; 1 Rev. St. p. 756, § 3; Laws 1896, c. 547, § 269. While there was no covenant to pay the debt, none was needed, for the property was worth much more than the amount of the indebtedness, and the mortgagee could safely confine his remedy to the land. 1 Rev. St. p. 739. The absence of such a covenant, the conditional release of any claim for deficiency, and the agreement not to record the defeasance, are of no importance, in view of the express admission that the deed was given as security. The deed and defeasance were executed at the same time, and, as the latter in express terms refers to the former, they must be construed the same as if both were embodied in a single instrument. When read together in the light of the admission that the object was to secure a debt, it is clear that the transaction was not

a conditional sale, and that the covenant making time the essence of the contract to reconvey has no more effect than if it occurred in the defeasance clause of an ordinary mortgage. An instrument executed simply as security cannot be turned into a conditional sale by the form of a covenant to reconvey, and, even if there was a doubt as to the meaning, the contract would be regarded as a mortgage, so as to avoid a forfeiture, which the law abhors. *Matthews v. Sheehan*, 69 N. Y. 585. As was said by the supreme court of the United States: "It is an established doctrine that a court of equity will treat a deed absolute in form as a mortgage when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction, and when it is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. * * * It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has, in a court of equity, a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates." *Peugh v. Davis*, 96 U. S. 332, 336, 24 L. Ed. 775.

The right to redeem is an essential part of a mortgage, read in by the law, if not inserted by the parties. Although many attempts have been made, no form of covenant has yet been devised that will cut off the right of a mortgagor to redeem, even after the law day has long passed by. *Clark v. Henry*, 2 Cow. 324, 331; *Jones, Mortg.* § 1039. Even an express stipulation not to redeem does not prevent redemption, because the right is created by law. For the same reason an express power to sell at private sale after default is of no effect. "If," said Chancellor Kent, "a freehold estate be held by way of mortgage for a debt, then it may be laid down as an invariable rule that the creditor must first obtain a decree for a sale under a bill of foreclosure. There never was an instance in which the creditor, holding land in pledge, was allowed to sell at his own will and pleasure. It would open the door to the most shameful imposition and abuse." *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 100. The utmost effect claimed for the provision that the defeasance was not to be recorded is that it was a consent to a private sale after default. As was well said by a recent writer: "If the instrument is in its essence a mortgage, the parties cannot by any stipulation, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor cannot, in the inception of the instrument, as a part of or collateral to its execution, in any manner deprive himself of his equitable right to come in after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land

from the lien and incumbrance of the mortgage. The equitable right of redemption after a default is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right." 3 Pom. Eq. Jur. § 1193. So Mr. Thomas says that "it was a bold, but necessary, decision of equity that a debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem." Thom. Mortg. § 9. To prevent undue advantage through inadequacy of consideration, either with or without an opportunity to repurchase, the courts are steadfast in holding that a conveyance, whatever its form, if in fact given to secure a debt, is neither an absolute nor a conditional sale, but a mortgage, and that the grantor and grantee have merely the rights, and are subject only to the obligations, of mortgagor and mortgagee. *Lawrence v. Trust Co.*, 13 N. Y. 200.

In the case before us there was no purchase of the land by Owen Byrne, for the existing relation of debtor and creditor between himself and the plaintiff was not ended, but was continued by a contract intended to secure the old debt, together with some further advances. He had a lien on, but no estate in, the land. *Thorn v. Sutherland*, 123 N. Y. 236, 25 N. E. 362; *Hubbell v. Moulson*, 53 N. Y. 225, 228, 13 Am. Rep. 519. She had the right to redeem, and he the right to hold the land until she redeemed, or her right of redemption was cut off by the judgment of a court of competent jurisdiction. The continued existence of the debt is the birthmark of a mortgage, and that is involved in the concession that the land was conveyed as security. The passing of the law day did not extinguish her right, for "once a mortgage always a mortgage" is a maxim so sound and ancient as to be a rule of property. As the deed was a mortgage when given, it did not cease to be a mortgage after the period of redemption had expired. In *Macauley v. Smith*, *supra*, it was held that the surrender of possession by the grantor to the grantee after the debt became due did not prevent the levy of an attachment, issued in behalf of creditors of the former, upon lands conveyed to the latter as security. The plaintiff, therefore, is a mortgagor, whose right to redeem from the mortgagee in possession has not been cut off nor cut down by any act or omission on her part.

As the defendants stand in the shoes of Owen Byrne, with no rights except by way of gift under his will, the case is the same in principle as if he were living and the sole defendant. After the plaintiff had established her right to redeem, as to him, what answer could he make thereto? Would it be an answer for him to say, "I have conveyed the lands away, and therefore you cannot redeem"? While this would be a conclusive answer in behalf of Walker, the present owner of the land, if he had been made a party, and the

right to redeem had been asserted against him, can Owen Byrne or his devisees say that, by his wrongful act in conveying the land, he deprived the plaintiff of the right to redeem in any form, and confined her to an action for the moneys received on the sale, to which the statute of limitations would be a bar? Can a mortgagee, by his own act, without a judicial sale or the consent of the mortgagor, destroy the right to redeem, which is so carefully guarded by the courts? The mortgagee could not, by selling the mortgaged premises, change the rights of the plaintiff as against himself. As to him, she still has the right to redeem; for by his act, without her knowledge or consent, he could not annul his covenant to reconvey. That covenant is still in force, and the plaintiff may compel its performance, so far as the rights of third parties acquired under the recording act will permit.

As Owen Byrne conveyed to a bona fide purchaser, the plaintiff cannot follow the land as such; but she is not prevented by that wrongful act from any form of redemption now practicable. No act of his could utterly destroy her cause of action to redeem. He might affect its value, but he could not take its life. As a substitute for a decree requiring him to repurchase the land and convey it to her, which might be impossible, and would be apt to involve hardship, she may treat the value of the land, measured in money presumed to be in his hands when her right to redeem was established, as land, and enforce the right of redemption accordingly. Unless we virtually sanction his wrongdoing by permitting him to defeat her right of redemption absolutely by his own act, upon showing a right to redeem, she must be permitted to make the best redemption possible as against him. Because he has put it out of his power to render to her all she is entitled to, he cannot refuse to make the nearest approach to it that is left. A court of equity, in order to bring about an equitable result, disregards forms, and treats money as land and land as money, when required to prevent injustice. A mortgagee in possession under a recorded deed absolute on its face, with an unrecorded defeasance, cannot sell the land and claim that the purchase price is money, as against one who has an equitable right to insist that in legal effect it is land.

As the plaintiff established a right to redeem, Owen Byrne and his devisees cannot complain if, in working out the relief required by the violation of his covenant, the court does the best it can to right the wrong by treating the money as land. In order to prevent him from making a profit out of his wrong, the law raises the presumption that he now has the full value of the land as a separate fund in his hands, and, treating it as land, allows the plaintiff to redeem, the same as if it were in fact land. As against the wrongdoer and his estate, it will exert all its power to make the plaintiff whole, paying due regard to equities arising through improvements upon the

land, so as not to give her more than she is equitably entitled to. Thus, in *Meehan v. Forrester*, supra, the court through Rapallo, J., said: "The sale was shown to have been made without the consent of Meehan, and in violation of his rights, and it does not appear that the plaintiff ever had notice of it. He was not bound by such a sale. He was entitled to his land, on payment of the amount due to Bertine or his representatives. If Bertine, by reason of his own wrongful act, had deprived himself of the ability to restore the land, to which the plaintiff is equitably entitled, he or his representatives were bound to account to the plaintiff, at his election, either for the proceeds of sale of the land, or its value at the time when the plaintiff's right to such reparation was established. *Hart v. Ten Eyck*, 2 Johns. Ch. 117; *Peabody v. Tarbell*, 2 Cush. [Mass.] 227, 233; *May v. Le Claire*, 11 Wall. 236, 237, 20 L. Ed. 50."

In that case, as in this, the only cause of action alleged or proved was the right to redeem; but, as the premises had been wrongfully conveyed, the plaintiff, upon establishing such right, was awarded compensation on the basis of value at the time of the trial. Compensation was allowed as an equitable substitute for actual redemption. In other words, the land which should have been conveyed was appraised by the court, and the defendant compelled to restore the amount of the appraisal, as the only method of redemption possible. The form of relief granted was a money judgment, but that was possible only because a right to redeem had been established, for without that right the relief would be limited to the proceeds of the sale. *Baily v. Hornthal*, 154 N. Y. 648, 661, 49 N. E. 56, 61 Am. St. Rep. 645. So in the case at bar, the plaintiff established the same right, but the defendant showed that he had placed it beyond his power to reconvey. Thereupon, in rebuttal, and not as a part of her cause of action, the plaintiff had the right to prove the present value of the land, so as to follow the money presumed to be in the defendant's hands, and redeem that which he had wrongfully substituted for the land, the same as if it were in fact land.

Guided by the cardinal principle that the wrongdoer shall make nothing from his wrong, equity so molds and applies its plastic remedies as to force from him the most complete restitution which his wrongful act will permit. *May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50; *Van Dusen v. Worrell*, 4 Abb. Dec. 473; *Miller v. McGuckin*, 15 Abb. N. C. 204; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108; *Enos v. Sutherland*, 11 Mich. 538, 542; *Budd v. Van Orden*, 33 N. J. Eq. 143; *Van Orden v. Budd*, 33 N. J. Eq. 564. When he cannot restore the land, it will compel him to restore that which stands in his hands for the land, and will not permit him to assert that it is not land, when the assertion would be profitable to himself, but unjust to the one whom he wronged. He cannot escape by offering to pay what he received on selling the lands, but must pay the value at

the time of the trial. He cannot cut off the right of redemption, and convert it into a personal liability; for he is still a mortgagee, and subject, as such, to the mortgagor's rights. The fact that the injured mortgagor need not take the proceeds of the sale, but may insist on the proved value of the land, as well as the pleadings and proofs, shows that this is a pure action to redeem, and must be so regarded for all purposes, including the defense of the statute of limitations. While the mortgagor is helpless as against his grantee, she is not helpless as against him.

The defendants insist that, as the plaintiff can only recover a money judgment, the cause of action is in the nature of an accounting for money had and received, and hence that the 6-year, or at most the 10-year, statute of limitations is a bar. This is not an action, however, to recover money, but to redeem land from a mortgage, and but for the misconduct of the defendant would have resulted simply in a judgment of redemption, with an accounting for the rents and profits of the land, after payment of the debt by the plaintiff, according to her demand and offer before the commencement of the action. The period of limitation provided by the Code, within which an action to redeem from a mortgage may be maintained, is 20 years after breach of the condition or the nonfulfillment of the covenant therein contained. Code Civ. Proc. § 379. So far as the defendants are concerned, the plaintiff had a right to redeem. She brought her action to redeem, and established it by evidence, and was entitled to judgment accordingly; but as that judgment would be ineffectual, because the mortgagee had sold the land, equity will simply vary its relief from a judgment of redemption in land to a judgment of redemption in money representing the land.

If the plaintiff had not elected to redeem, but to sue for money had and received to her use, the case of *Mills v. Mills*, 115 N. Y. 80, 21 N. E. 714, relied upon by the defendants, might be an authority. In that case, however, as was stated by this court, "all the relief asked for in the complaint is an accounting, and a judgment for a sum of money, and no other relief was needed or possible upon the facts established. This was in no sense an action to redeem, as there was no mortgage, and nothing to redeem." The relief demanded, as appears from the appeal book on file in this court, was simply a judgment "for all moneys received by" the defendant. No claim was made that the two transactions, which were 4 years apart, constituted a mortgage, or that there was ever a right to redeem. The theory of the action was that the defendant lawfully sold the land, and should account for the proceeds, after deducting his own claim. Thus the court said: "Absolute title to the lands was vested in the defendant, evidently with the intention that he might sell them and reimburse himself, and pay over any surplus to his brother." The fundamental fact that the defendant sold without right was wanting in that case,

and hence the principle which is the basis of our judgment could not be applied. It is the wrongful conveyance by the mortgagee in possession, under a deed absolute on its face, that enables a court of equity to hold onto the case after ordinary redemption has been shown to be impossible, and to allow such a redemption against the wrongdoer as will prevent him from gaining by his wrong, and will give the plaintiff her due as nearly as may be. The judgment appealed from should be reversed, and a new trial granted, with costs to abide event.

PARKER, C. J., and BARTLETT, MARTIN, and WERNER, JJ., concur. GRAY, J., not voting. CULLEN, J., not sitting.

Judgment reversed, etc.

3. MORTGAGE OR CONDITIONAL SALE

HOLLADAY v. WILLIS.

(Supreme Court of Appeals of Virginia, 1903. 101 Va. 274, 43 S. E. 616.)

Appeal from Circuit Court, Orange County.

Action by Leah S. Willis against H. T. Holladay and another to recover of defendant Holladay the difference between the sum paid by him for certain property under a deed from plaintiff absolute on its face, but alleged by her to have been a mortgage, and the amount received by him on sale of the property, and also to compel defendant Willis to carry out her agreement to purchase the property. Judgment for plaintiff, and defendant Holladay appeals. Reversed.

WHITTLE, J. This controversy arose as follows: Appellee, Leah S. Willis, who was the owner of a house and lot near Charlottesville, Va., on October 8, 1894, borrowed of the Iron Belt Building & Loan Association \$800, and executed a deed of trust on the property to secure it.

The house and lot was occupied by appellee, together with her husband, H. G. Willis, and his parents, R. G. Willis and R. A. Willis, as a residence. At the date of the transaction hereinafter referred to, R. G. Willis and R. A. Willis were the owners of a trust fund in the hands of appellant, H. T. Holladay, a brother of Mrs. R. A. Willis, as trustee, the investment of which was subject to their control and direction. Appellee having made default in the payment of the debt due the association, for the purpose of discharging the demand and relieving the house and lot from the deed of trust, and securing it as a home for appellee, it was suggested by the elder Willis and wife that so much of the trust fund as was necessary should be applied to that purpose. Accordingly, at their request, appellant, who lived at Rapidan, Culpeper county, Va., came to Charlottesville, and a conference ensued between him and H. G. Willis and his parents touching the

matter in hand. The scheme of paying the debt with the trust fund was discussed, but it was decided not to be feasible, for the reason that cash was required to meet the demand of the association, and the trust fund was not in hand, and not due at that time.

It appears that the land representing that fund had been sold, and the purchase money (\$1,800) was payable in three installments of \$600 each in July, 1896, 1897, and 1898. Appellant was desirous to co-operate in securing the property for the parties, and, with that end in view, proposed that he would become the absolute purchaser of the house and lot for an amount sufficient to discharge the lien upon it, and take a deed from the trustees of the association and H. G. Willis and wife conveying the property to him, and that he would thereupon give a written option to Mrs. R. A. Willis to purchase it within two years from the date of the deed at the price paid by him with interest and costs. In the meantime the first and second installments of the trust fund would have matured, and supply the necessary means with which to effect the purchase. This arrangement was agreed to by the parties; but appellee, who was represented by her husband, was not present during a discussion of the details. For that reason, before the matter was finally closed, appellant sought an interview with appellee, and asked her if she understood that in selling the property to him she was parting with her entire interest in it. She replied in the affirmative; as she afterward explains in her deposition, her idea being that the trust fund would be available before the expiration of the option period, and that the property would be purchased by Mrs. R. A. Willis, and ultimately pass to H. G. Willis as heir to his mother.

In pursuance of the plan agreed on, appellant paid the debt to the association, and on January 22, 1896, appellee and her husband united with the trustees of the association in an absolute deed of bargain and sale, whereby they conveyed the house and lot to him.

Subsequently appellant executed the option agreement contemplated, by the terms of which Mrs. R. A. Willis was allowed two years from the date of the deed within which to purchase the house and lot by paying to appellant out of the trust fund the amount of his expenditure, with interest and costs.

At the same time, R. G. Willis and wife directed appellant, as trustee, in writing, to invest as much of the trust fund as was necessary, under the provisions of the option contract, in the house and lot.

In pursuance of that direction, appellant, in good faith, upon collecting the first \$600 installment of the trust fund, applied it, as required, toward the purchase of the property for Mrs. R. A. Willis.

Thus matters remained until February, 1897, when R. G. Willis and R. A. Willis changed their minds in respect to the purchase of the Charlottesville property, and directed the trustee to invest part of the trust fund in a farm in Orange county, to repair the buildings

thereon, and to supply the place with necessary farming implements, and invest the residue of the fund at interest.

It is not pretended that appellant was in any manner responsible for this change of program. On the contrary, when apprised of it, he frankly told the parties that, if he carried out their instructions and bought the farm, they would have to give up the house and lot, as their means were insufficient to purchase both. With a thorough understanding of the consequences, they adhered to the determination of buying the farm, assigning as a reason for the change that H. G. Willis was not making a support for his family in Charlottesville; that he had become very dissipated, and it was necessary to remove him from his then surroundings. The farm was accordingly purchased, the Charlottesville property was surrendered to appellant, and appellee and her family and R. G. Willis and wife removed to their new home in Orange county. In the following June—a year and a half after his purchase—appellant sold the house and lot to W. L. Maupin for \$1,600. Nearly three years thereafter, to wit, in April, 1900, appellee brought suit in equity against appellant and Mrs. R. A. Willis to recover of the former the difference between the amount paid by him for the property and the price at which he afterwards sold it to Maupin.

The bill also prays that, if necessary, Mrs. R. A. Willis may be held responsible for her failure to carry out her agreement to purchase the property from appellant in accordance with the stipulations of the option contract.

Appellee maintains (1) that the deed referred to, while absolute on its face, is in fact a mortgage; and (2) that appellant's conduct in connection with the procurement of the deed was fraudulent. She therefore insists that he ought to be regarded, in equity, as a trustee, and required to account for and pay over to her any profit that may have accrued to him from the transaction.

Appellant and Mrs. R. A. Willis, in their answers to the original and amended bills, set out in detail their version of the matter, and insist that their conduct had been in all respects fair; and that the transaction was fully understood and acquiesced in by appellee. They also maintain that the deed in question is what it purports to be—an absolute conveyance, and not a mortgage.

At the hearing the trial court adjudged the deed to be a mortgage, and decreed that appellant should be held responsible to appellee for all profit made by him on the sale to Maupin.

The doctrine that a conveyance of land absolute on its face may, in equity, be shown by extrinsic parol evidence to be a mortgage, is, of course, too well settled to require either discussion or the citation of authority to sustain it. But it is equally well settled that the presumption in such case always is that the deed is what on its face it purports to be; and, in order to repel that presumption, the evidence must be

clear, unequivocal, and convincing. 3 Pom. Eq. § 1196; *Phelps v. Seely*, 22 Grat. 573; *Snively v. Pickle*, 29 Grat. 27; *Edwards v. Wall*, 79 Va. 321.

The rule is thus stated by Chief Justice Ruffin in *Franklin v. Roberts*, 37 N. C. 560: "When the answer denies the right of redemption, the proofs must be clear, consistent, and cogent, composed of circumstances incompatible with the idea of an absolute purchase, and leaving no doubt on the mind."

The doctrine is in derogation of the general rule that parol evidence is inadmissible to contradict or substantially vary the legal import of a written instrument. *Towner v. Lucas' Ex'r*, 13 Grat. 705. It is within the mischief intended to be prevented by that rule, and hence the necessity for the qualification that the proofs must be so convincing as to leave no doubt on the mind that a mortgage, and not an absolute conveyance, was intended. The evidence in this case falls far short of that requirement. Indeed, it shows quite the reverse. It appears that the only contract between the parties is embodied in the deed of January 22d, and the option contract of February 6, 1896, and that appellee understood that the effect of her deed was to divest her of all interest in the property, but that the right to purchase it at actual cost within two years was guarantied to Mrs. R. A. Willis by the terms of the option.

So that the decision of the case must depend upon the proper construction of those instruments, taken together, in the light of the contemporaneous understanding of the parties.

The distinction between a mortgage and a conditional sale is clearly drawn in *Turner v. Kerr*, 44 Mo. 429, as follows: "A mortgage and a conditional sale are said to be nearly allied to each other, the difference between them being defined to consist in this: that the former is a security for a debt, while the latter is a purchase accompanied by an agreement to resell on particular terms. * * * Where the parties intend a conditional sale, and not a mortgage, and make their contracts in accordance with their intentions, it is not the province of the court to circumvent and frustrate their intentions. It is nevertheless true that neither the intention of the parties nor their express contract can change the essential nature of things. A conveyance to secure a debt is a mortgage, and the stipulations of the parties cannot make it otherwise. But a conveyance to pay a debt is a totally different affair. If the conveyance extinguishes the debt, and the parties so intend, so that a plea of payment would bar an action thereon, a subsequent or contemporaneous stipulation in the interest of the debtor, securing to him an opportunity to reacquire the title, ought not to be construed to the creditor's prejudice. Such a transaction is no mortgage, but a conditional sale."

In *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583, the rule is stated thus: "If, by the intention of the parties, the transaction was origi-

nally a security for the payment of money, it will be held in equity to be a mortgage, and the maxim, 'Once a mortgage, always a mortgage,' applies, and it will remain such, unless changed by a new contract. * * * But if, originally, the transaction was a sale of property with a right of repurchase at the option of the grantor, it is a conditional sale, and no subsequent event short of a new agreement between the parties can convert it into a mortgage."

"When it is clear that after the execution of the instrument no debt remains due from the grantor to the grantee, the transaction is a contract of sale, and the deed must be given its legal effect." 1 Jones on Mortgages, § 263.

Applying these principles to the facts of the case in hand, the deed and option contract constitute a conditional sale, and not a mortgage. There was no indebtedness due from appellee to appellant and Mrs. R. A. Willis, or to either of them, and hence there can be no mortgage by implication. The existence of a debt is the test. A mortgage without a debt to support it is a legal solecism. 3 Pom. Eq. § 1195; 1 Jones on Mortgages, § 265. The transaction between the appellant and the association extinguished the indebtedness of appellee; and, by the understanding of appellant and appellee, the payment of that indebtedness did not constitute a new debt, but a consideration for the deed to the house and lot from the latter to the former. The character of the transaction is fixed in its inception, and is what the intention of the parties makes it. If it was a mortgage originally, it remains so; and the same is true of a conditional sale. In either case it is unaffected by subsequent events, unless they amount to a change of contract. The form of the transaction and the circumstances attending it are but the means of ascertaining the real intention of the parties.

If at the sale to Maupin the property had brought less, instead of more, than appellant paid for it, it is quite clear that he would have had no remedy over against appellee for the deficit, as would unquestionably have been the case had the relation of creditor and debtor existed between them. The title to the property passed by the deed to appellant, subject to be divested only by a performance of the condition contained in the option contract; and that supplies all the essential elements of a conditional sale, in which the ground of defeasance is dependent on a condition subsequent.

While the case is unquestionably one of unusual hardship, and appeals strongly to the sympathies, nevertheless, in its legal aspects, this court has been unable to reach the conclusion either that the deed in question is a mortgage or that it was fraudulently procured.

An attempt on the part of the courts to correct the hardship of particular cases by a departure from settled principles, if permissible, would, in the general result, inevitably accomplish far more harm than good.

As was observed by Chief Justice Marshall in *Conway v. Alexander*, 7 Cranch, 218, 3 L. Ed. 321: "To deny the power of two individuals capable of acting for themselves to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the courts of chancery in a considerable degree the guardianship of adults as well as infants. Such contracts are certainly not prohibited either by the letter or the policy of the law."

It follows from these views that the decree complained of is erroneous, and must be reversed.*

4. DEED OF TRUST

FISKE v. MAYHEW.

(Supreme Court of Nebraska, 1911. 90 Neb. 196, 133 N. W. 195, Ann. Cas. 1913A, 1043.)

Appeal from District Court, Hamilton County; Good, Judge.

Action by Rodman W. Fiske, trustee, against Edward F. Mayhew and others. From the judgment, defendants Edward F. Mayhew and another appeal. Affirmed.

LETTON, J. Edward F. Mayhew, a dealer in agricultural implements at Friend, Neb., being indebted to a number of creditors, on February 23, 1907, executed a conveyance to Rodman W. Fiske, trustee. The first portion of this conveyance is in form a warranty deed. Then follows a provision that the trustee shall have immediate possession of the land and the right to the crops, a recital that "this conveyance is made for the use and benefit of all parties hereinafter named; and said Edward F. Mayhew being indebted to said parties in the respective sums set forth as follows, to wit: Moon Brothers Carriage Co. \$702.00," etc., setting forth the names of each creditor and the amounts due each severally. It is next provided that the trustee "shall place the said premises upon the market for sale, use due diligence to sell the same to the best possible advantage and to obtain the best

* For further cases, distinguishing a mortgage from a conditional sale, see *Slutz v. Desenberg*, 28 Ohio St. 371 (1876); *Beldelman v. Koch*, 42 Ind. App. 423, 85 N. E. 977 (1908); *Harmon v. Banking, etc. Co.*, 60 Or. 69, 118 Pac. 188 (1911). The actual intention of the parties governs, gathered from the written instrument and also from the circumstances of the particular case. *Phillips v. Jackson*, 240 Mo. 310, 144 S. W. 112 (1912); *Yost v. Hays City First Nat. Bank*, 66 Kan. 605, 72 Pac. 209 (1903); *Hershey v. Luce*, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6 (1892); *Horbach v. Hill*, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. Ed. 670 (1884).

price he can therefor, hereby giving to him full power to sell the same at public or private sale at such time as he shall deem best, and from the proceeds" he shall pay the creditors in proportion to their claims, and the residue, if any, shall be paid to Mayhew. Next follows the following provision: "This instrument shall not be construed as a mere mortgage, it being the design and purpose of the said grantors herein to clothe the said Rodman W. Fiske with plenary power to make an absolute sale and conveyance of said premises for the purposes herein expressed, and to that end the said grantors hereby constitute, create and make the said Rodman W. Fiske their attorney in fact, without the power of revocation to make sale of said premises and deed of conveyance of the same vesting an indefeasible title in the purchaser thereto."

This action was brought to foreclose the trust deed. The plaintiff takes the position that the instrument, though in form a warranty deed with a power of sale, is, in fact, a mortgage, and that foreclosure is necessary in order to cut off the equities of the defendants, and convey a valid title to a purchaser. The defendants insist that the instrument is a warranty deed conveying the legal title to Fiske, and constituting him their attorney in fact, with power to sell the land at public or private sale at such time as he should deem best, and to make a good and sufficient deed to the purchaser conveying in fee simple. They further contend that they are entitled to have the land sold by the trustee at either public or private sale without foreclosure and the resulting loss and expenses.

The evidence discloses that the deed was executed at a meeting between Mayhew and the representatives of some of his creditors at the office of Mr. Haney, in Lincoln; and, while not expressed in the deed of trust, it was agreed that Mayhew might pay the debts at any time. After the conveyance was made, the property was advertised in the Lincoln and Omaha papers by Fiske. An offer was received of \$10,700, which Fiske submitted to Mayhew, but which was rejected by him. Mayhew testifies that, when the deed was executed, it was not represented to him as a mortgage; that he still claims an interest in the property, and has ever since the deed was signed; that he has paid none of the interest or principal on these debts; that he has taken possession of the land and collected the rents; that the first year he paid the taxes and interest; and that he claims to be entitled to the surplus proceeds of a sale, after the debts are paid, and that he had that understanding when he gave the deed.

The question as to the nature of a mortgage and the essential quality of like instruments to that in consideration here came up at an early date in the legal history of this state. In *Kyger v. Ryley*, 2 Neb. 20, the history and character of mortgages at common law and in equity was considered, and it is said that "a mortgage in this state is a mere pledge, or collateral security, for the payment of money, or the doing

of some other thing," and must be foreclosed by an action. In *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638, a deed which conveyed certain real estate to a trustee, and provided that, in default of the payment of a promissory note, the trustee was empowered to sell the estate at public auction, but that upon full payment of the same with interest a reconveyance should be made, was held to be in effect a mortgage. The court said: "The fact that the mortgage in this instance is in the form of a deed of trust does not change its character from a mere security for the payment of money, nor does it convey the legal title, nor do the restrictions therein contained prevent the plaintiff from availing herself of the safeguards thrown around the debtor to prevent a sacrifice of her property."

In *Hurley v. Estes*, 6 Neb. 386, it is said in the syllabus: "A deed of trust is a mortgage, and only differs from a mortgage with a power of sale in its being executed to a third person, instead of a creditor. When an instrument is given as security for the payment of money, or the performance of some collateral act, it is a mortgage whatever may be its form." Judge Maxwell in the opinion quotes authorities establishing the rule. *Comstock v. Michael*, 17 Neb. 288, 22 N. W. 549, and *Staunfield v. Jeutter*, 4 Neb. (Unof.) 847, 96 N. W. 642, are to the same effect. This is the general rule. 27 Cyc. 1004, and cases cited in note 7; 3 Devlin, *Deeds* (2d Ed.) § 1126.

While in many or perhaps the majority of the states a deed of trust with a power of sale may be foreclosed by a strict foreclosure under the power conferred (27 Cyc. 1450), we consider the law settled to the contrary in this state. There is a difference between the instruments involved in the foregoing cases and that under consideration here, in this: that in each of the former the debt was payable at a future day, and there was a condition that, in default thereof, the deed should become absolute, while in the present case the power confers the immediate right to sell the property. In this respect, however, the instrument is no different in effect from an ordinary mortgage or deed of trust after condition broken. In such case the fact of default does not in any wise alter the legal relation of the parties, and, under the settled rules in this court, an action to foreclose the mortgage is necessary in order to bar the equity of the mortgagor or grantor and other persons claiming under him. *Wheeler v. Sexton* (C. C.) 34 Fed. 154, which is a Nebraska case; *Comstock v. Michael*, *supra*; *Hurley v. Estes*, *supra*. This is the view taken by other courts. *Ogden v. Grant*, 36 Ky. (6 Dana) 473; *National Bank v. Lovenberg*, 63 Tex. 506; *Cooper v. Brock*, 41 Mich. 488, 2 N. W. 660; 27 Cyc. 1004. There is a full discussion of the general subject in 2 Jones, *Mortgages* (6th Ed.) § 1764 et seq.

It is true that in the instrument it is provided that "this instrument shall not be construed as a mere mortgage," and that the grantors by the instrument constitute Fiske their attorney in fact "to make sale of said premises and deed of conveyance of the same vesting an in-

defeasible title in the purchaser thereto," but this language cannot control the whole instrument. The decisive facts in the case are that the instrument was intended to convey the land as security for the payment of certain debts, and not to divest the grantor of all his interest in the land. He still retained in equity the title to the land. The instrument was intended as a security, under the rule in this state is a mortgage, and must be foreclosed as one.

The judgment of the district court is affirmed.

5. AGREEMENT TO GIVE A MORTGAGE

FOSTER LUMBER CO. v. HARLAN COUNTY BANK.

(Supreme Court of Kansas, 1905. 71 Kan. 158, 80 Pac. 49, 114 Am. St. Rep. 470, 6 Ann. Cas. 44.)

Error from district court, Phillips county; A. C. T. Geiger, Judge.

Action by the Harlan County Bank against the Foster Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

BURCH, J. Arthur A. Underwood held a contract of purchase from the Lincoln Land Company of certain real estate, upon which there remained a balance due. He was also under obligations to various persons on account of the erection of a house and other improvements upon the property. For the purpose of paying the amount due on the land and procuring a deed of it, and for the purpose of discharging his obligations for improvements on the land, he borrowed \$900 of the Harlan County National Bank. When the loan was made, he left his land contract with the bank, and authorized it to procure a deed of the property from the land company. At the same time he agreed orally with the bank that it should hold the contract, and then the deed, as security for the loan, until a formal written mortgage could be prepared, which he agreed to give. The bank paid the land company, obtained the deed, and paid out the remaining proceeds of the loan for the stipulated purposes. Underwood then refused to execute a mortgage to the bank, and mortgaged the property to the Foster Lumber Company. The lumber company, however, at the time it received its mortgage, had full knowledge of all the rights, claims, interests, and equities of the bank, and already had received \$300 of the loan direct from the bank, on account of its claim for improvements. The land was the homestead of Underwood and his wife. In an action by the bank for the recovery of a balance due upon its loan, it claimed and was awarded a lien on the land superior to that of the lumber company under its mortgage. The lumber company seeks a reversal of that judgment by this proceeding in error.

It is claimed the transaction disclosed amounted to nothing more than a deposit of title deeds as security for a loan, and hence that no

lien resulted. The bank, however, pleaded and proved, and the court found, that the deposit of the contract of sale was accompanied by an express oral agreement to give a mortgage. Such an agreement furnished a sufficient basis upon which, after performance by the bank, to found a lien, and is sufficient to take the case entirely out of the category of equitable mortgages arising from a deposit of title deeds merely.

It is further claimed that the bank, in its petition, relied upon the deposit of the land contract and the taking the deed from the land company as its security, and not upon the agreement to give a mortgage. The bank, however, simply pleaded the entire transaction as it actually occurred. The fact that the transaction may have included an attempt to create a lien by the deposit of title instruments does not alter or destroy the effect of the promise to give a mortgage. The bank's theory, in part, may have been that the deposit of the contract, and the procuring of the deed to Underwood's land did give it a lien. It had the right to present the question to the courts. But it did not thereby abandon the right to claim a lien by virtue of the express contract to give a mortgage, which it fully and plainly pleaded. The two claims are not inconsistent. Both have been urged. That of an equitable mortgage is sufficient to sustain the judgment of the district court, and no occasion arises to discuss the policy of the law of this state concerning the other. Having obtained the bank's money upon an agreement to give it a mortgage, Underwood should have executed and delivered the promised security. Equity treats that as done which a party, under his agreement, ought to have done. *Elston v. Chamberlain*, 41 Kan. 354, 361, 21 Pac. 259. And the court had no alternative but to apply the maxim in this case. 3 *Pomeroy Eq. Jur.* (2d Ed.) § 1237; 1 *Jones on Mortgages* (6th Ed.) § 163; 11 *A. & E. Encycl. of L.* (2d Ed.) 125.

The fact that the agreement to give a mortgage was oral does not affect the validity of the bank's lien. It had fully performed its part of the agreement. "The doctrine of equitable mortgages is not limited to written instruments intended as mortgages, but which by reason of formal defects cannot have such operation without the aid of the court, but also to a very great variety of transactions to which equity attaches that character. It is not necessary that such transactions or agreements as to lands should be in writing, in order to take them out of the operation of the statute of frauds, for two reasons: First, because they are completely executed by at least one of the parties, and are no longer executory; and, secondly, because the statute, by its own terms, does not affect the power which courts of equity have always exercised to compel specific performance of such agreements." *Sprague v. Cochran*, 144 N. Y. 104, 113, 38 N. E. 1000, 1002. "That statute was enacted to provide as far as possible against the perpetration of frauds, and courts of equity never allow its provisions to be perverted and made instrumental in the accomplishment of fraud. They

decree the specific execution of agreements where there has been a performance on the one side, because the refusal to perform on the other side is a fraud; and they will not permit the statute designed to prevent fraud to be made an engine of fraud. *Md. Sav. Inst. v. Schroeder*, 8 Gill & J. 93, 29 Am. Dec. 528; *Hamilton v. Jones*, 3 Gill & J. 127; *Artz and wife v. Grove*, 21 Md. 456; *Moale v. Buchanan*, 11 Gill & J. 314." *Cole v. Cole and wife*, 41 Md. 301. See, also, *Dean v. Anderson*, 34 N. J. Eq. 496; *Baker v. Baker*, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776; *King v. Williams*, 66 Ark. 333, 50 S. W. 695; 1 *Jones on Mortgages* (6th Ed.) § 164.

Besides this, it properly may be said that the lien actually decreed results from the operation of the law upon the entire conduct of the parties, and hence is, in terms, excluded from the inhibition of the statute.

"It is claimed by counsel for plaintiff in error, substantially, that an equitable lien on real estate, where it has any real existence, is an interest in land, and cannot be created merely by parol; that the statute of frauds (Gen. St. 1868, p. 505, § 5) prohibits such a thing. All of this we agree to, but still the statute of frauds does not attempt to prohibit the creation of equitable liens by operation of law, nor does any other statute. *Stevens v. Chadwick*, 10 Kan. 406, 15 Am. Rep. 340. Such a lien should, of course, be in accordance with the contract and understanding of the parties affected by it, but still it may sometimes result, by operation of law, from the transactions of the parties, almost wholly independent of the contract that may be made between them. It results, however, from the whole transaction, including all the contracts, agreements, and understandings of the parties, parol or otherwise." *Curtis v. Buckley*, 14 Kan. 449, 456. In the case of *Sprague v. Cochran*, supra, it is said: "There can be no doubt, upon the authorities, that where one party advances money to another upon the faith of a verbal agreement by the latter to secure its payment by a mortgage upon certain lands, but which is never executed, or which, if executed, is so defective or informal as to fail in effectuating the purpose of its execution, equity will impress upon the land intended to be mortgaged a lien in favor of the creditor who advanced the money, for the security and satisfaction of his debt. This lien attaches upon the payment of the money, and, unless there is a waiver of it, express or implied, remains and may be enforced so long as the debt itself may be enforced. * * * The whole doctrine of equitable mortgages is founded upon the cardinal maxim of equity which regards that as done which has been agreed to be done and ought to have been done. In order to apply this maxim according to its true meaning, the court will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been." This being true, the situation of the parties at the time the lumber company took its mortgage was precisely the same as if

the contemplated mortgage to the bank had actually been given, and notice to the lumber company of the bank's rights was equivalent to notice of a prior unrecorded mortgage. Under the recording acts, such instruments are valid between the parties and all persons having actual notice of them. *N. W. Forwarding Co. v. Mahaffey, Slutz & Co.*, 36 Kan. 152, 12 Pac. 705. Hence the lien of the lumber company was necessarily inferior to that of the bank. *Jones v. Lapham*, 15 Kan. 540; 11 A. & E. Encycl. of L. (2d Ed.) 141.

The position taken by the lumber company in the court below and in this court is that the bank was not entitled to any lien whatever, in any sum. The attacks made upon the findings of fact and conclusions of law were directed to the complete annihilation of the equitable mortgage sought to be foreclosed. No effort has been made to exclude any of the items utilized in computing the amount of the lien, and the mortgage has been left to stand or fall as an entirety. If, therefore, any part of it be valid as against the claimed homestead character of the premises, the judgment cannot be disturbed. There can be no doubt but that, to the extent of the unpaid purchase price of the land, the bank's equitable mortgage was a purchase-money mortgage, and therefore valid without the consent of Mrs. Underwood, and notwithstanding the property was occupied as a homestead. Const. art. 15, § 9; *Pratt v. Topeka Bank*, 12 Kan. 570; *Andrews v. Alcorn*, 13 Kan. 351; *Ayres v. Probasco*, 14 Kan. 177; *Nichols v. Overacker*, 16 Kan. 54.

All other assignments of error have been examined and found to be unsubstantial. The judgment of the district court is affirmed. All the Justices concurring.⁷

IV. Consideration of Mortgages *

BAIRD v. BAIRD.

(Court of Appeals of New York, 1895. 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375.)

Appeals from supreme court, general term, Fifth department.

Actions by Isabella M. Baird, as executrix, against William Baird, impleaded, etc., and against James C. Baird, impleaded, etc., to foreclose mortgages. From the judgments of the special term (30 N. Y. Supp. 785) affirming judgments for defendants, plaintiff appeals in each case. Affirmed.

⁷ In accord: *Edwards v. Scruggs*, 155 Ala. 568, 46 South. 850 (1908); *Hall v. Hall*, 50 Conn. 104 (1882); *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535 (1904); *Wickes v. Hynson*, 95 Md. 511, 52 Atl. 747 (1902); *Whitney v. Foster*, 117 Mich. 643, 76 N. W. 114 (1898); *Carter v. Holman*, 60 Mo. 498 (1875); *Atlantic Trust Co. v. Holdsworth*, 167 N. Y. 532, 60 N. E. 1106 (1901); *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999 (1879).

* For discussion of principles, see *Burdick*, Real Prop. § 188.

O'BRIEN, J. Prior to the year 1873, John Baird, the plaintiff's husband and testator, was the owner of the farm which is covered by the two mortgages sought to be foreclosed in these actions. In that year his two sons, William and James, defendants, went into possession of it, and the father directed the assessors to transfer the assessment on the farm to his sons. They have remained in possession ever since. In October, 1874, the father deeded the farm to the sons, who took title under these deeds as tenants in common. It appeared that the father had two other farms, all of which had been paid for and improved with the aid of the labor and services of his sons, who had worked for him after their majority. On a settlement between the father and the two sons, it was agreed that he was indebted to them in the sum of \$5,000, and that was the consideration for the conveyance. A deed was given to each son conveying an undivided half of the farm in consideration of \$2,500.

The evidence tended to show, and the trial court has found, that the intention was to vest the title in the sons in fee; but it appears that the father had some fears that his sons would not be able to take care of the property thus conveyed, and that it might be lost in speculation or otherwise. In order to prevent such a result, as he said, he required the sons to give back to him mortgages for \$1,500 each on the farm. No bond was given, and no actual debt was intended to be secured, and they were not recorded by the father in his lifetime. With respect to the purpose and consideration of these mortgages, the testimony tended to show, and the trial court found, that they were not intended to secure any debt or to be or become a valid subsisting security, or to be recorded or enforced, and were, in fact, without any consideration whatever. In the year 1875 the wife of John Baird, and mother of the defendants, died, and the year following he married the plaintiff. He died in 1883, leaving a will, in which the plaintiff was named as executrix. In that capacity she brought actions against each of the sons to foreclose the mortgages given by them respectively. The complaint was dismissed in each case, and the judgments were affirmed at general term. There are two appeals and two records, but both judgments rest on precisely the same facts, and the questions involved in both appeals are identical. Both cases may, therefore, be conveniently considered and disposed of as one.

The plaintiff's right to enforce the mortgage is the same and no other than the mortgagee, her husband and testator, had in his lifetime. She stands in the place of her husband, and cannot enforce the instrument unless he could, and every defense that the defendants could urge against the mortgage during the life of the father they may interpose now against his personal representative. The instruments purport to have been given to secure the payment of money, but it was shown at the trial affirmatively, and found by the trial court, that no debt in fact existed in favor of the father against either of the sons:

that there was no intention to give the mortgage on the one hand, or to hold it on the other, as security for any debt; that in fact there was no legal or equitable consideration moving between the parties, and no intention on either side to treat the instruments as binding obligations or as valid or subsisting securities. The evidence upon which these findings were made, if competent, was sufficient, and the fact is not open to question or review here.

The findings are based upon the business relations which the parties occupied to each other before the father gave up the possession of the farm to the sons, and then conveyed it to them, taking back the mortgages in question, and upon his subsequent conduct and declarations as to the character of the instruments and the purpose of their execution and delivery. The general principle that an instrument under seal, in the form of a mortgage upon real estate, which upon its face expresses a consideration and purports to have been given as security for a debt, may, nevertheless, as between the parties, be shown to have been purely voluntary or without any consideration, and so invalid, is not denied. *Davis v. Beckstein*, 69 N. Y. 440, 25 Am. Rep. 218; *Hill v. Hoole*, 116 N. Y. 299, 22 N. E. 547, 5 L. R. A. 620; *Briggs v. Langford*, 107 N. Y. 680, 14 N. E. 502; *Thomas, Mortg.* § 847; *Jones, Mortg.* § 1297.

The point upon which the learned counsel for the plaintiff relies is that evidence was not admissible at the trial to wholly contradict and defeat the instruments by showing, contrary to what appeared on their face, that they were intended to have no operation whatever. It is sought to distinguish this case from that of a deed, absolute upon its face, which may be shown to be in fact a mortgage, and from the numerous other cases in which equity permits a party to show that an instrument, appearing upon its face to be of one character, is or ought to be in truth of quite another character. It is said that the principle upon which these cases rest gives no sanction to what was held by the court below in this case, that a party may impeach his deed by showing, not only that it was without consideration, but that it was intended to have no validity or become of any binding force whatever.

The desire on the part of the father to retain some sort of guardianship over the title to the farm which he had conveyed to the defendants was, perhaps natural enough under the circumstances, and it is frequently shown in such transactions. That the mortgages were not intended to be held by him for any other purpose is supported by the circumstances that no bond was given; that they were not recorded; and no claim was made by the mortgagee during his life, a period of about nine years, that they were in his hands for any other purpose, or for the payment of either principal or interest, though past due. All the circumstances, when considered with the proof of the statements and declarations of the father, were sufficient to warrant the findings of the trial court with respect to the real purpose with which the instruments were made and their true consideration. *Holmes v.*

Roper, 141 N. Y. 67, 36 N. E. 180; Lyon v. Riker, 141 N. Y. 225, 36 N. E. 189. The presumption of some consideration that arose from the presence of a seal was overthrown, and we must assume that the instruments were without consideration of any kind. Gray v. Barton, 55 N. Y. 68, 14 Am. Rep. 181; Best v. Thiel, 79 N. Y. 15; Torry v. Black, 58 N. Y. 185; Home Ins. Co. v. Watson, 59 N. Y. 395; Dubois v. Hermance, 56 N. Y. 673.

There is no reason that we can perceive for giving to these instruments any greater force or effect than was contemplated by the parties when they were executed and delivered. There is no estoppel or any right which attached in favor of third parties, and we are not aware of any principle which would now require a court of equity to treat these instruments as valid subsisting obligations, unless they were intended as such when made, and this is negatived by the findings. Nor do we perceive any good reason why the real purpose and true consideration and object of the mortgages should not be made to appear when the aid of a court of equity is invoked for their enforcement. The authority relied upon by the learned counsel for the plaintiff in support of his contention is a remark of Judge Rapallo in the case of Hutchins v. Hutchins, 98 N. Y. 56, in which it is said: "It has never been held that a deed can be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the intention or agreement of the parties that the grantee should acquire no right whatever under it, or that he should reconvey to the grantor on his request without any consideration." That remark must be understood with reference to the facts of the case then under consideration, which was the case of a deed absolute in form, but intended as a mortgage. The defendant's answer was, however, so drawn as to leave room for the construction that he intended to urge that the conveyance was intended to be wholly inoperative, or in trust, or to secure a debt which the parties had agreed should never be paid, and it was with reference to this feature of the case that the expression was used. It was applicable to the case then under review, but cannot be regarded as authority for the proposition that the defendants in this case are precluded from showing that the mortgages were without any consideration in fact, or that they were not intended by any of the parties to have the effect of incumbering or defeating the title which the father had just conveyed to his sons.

The rule which excludes evidence of parol negotiations or conditions, when offered to contradict or substantially vary the legal import of a written agreement, does not prevent a party to the agreement, in an action between the parties, from showing, by way of defense, the existence of a contemporaneous oral agreement, made at the time the writing was executed and delivered, which would render the use of the written instrument, for any purpose contrary to or inconsistent with the oral stipulation, dishonest or fraudulent. Juilliard v. Chaffee, 92 N. Y. 529. The consideration of a written instrument is always

open to inquiry, and a party may show that the design and object of the agreement was different from what the language, if alone considered, would indicate. *Id.* Parol evidence may also be given to show that a writing, purporting to be a contract or obligation, was not in fact intended or delivered as such by the parties. *Grierson v. Mason*, 60 N. Y. 394. So, a conveyance absolute in form may be shown, as against the heir at law of the grantee, to have been made in trust for the benefit of a partnership firm, of which the grantee was a member, and so held by him in trust for the firm. *Rank v. Grote*, 110 N. Y. 12, 17 N. E. 665. Of course there may be cases where the rights of innocent third parties intervene to modify or change the rules, as in the case of negotiable instruments, or where there exists some element of estoppel; but as between the parties to the instrument there is no reason why the truth, with respect to the real object and consideration of the instrument, may not be made to appear.

The plaintiff was not entitled to maintain the actions for the foreclosure of the mortgages unless it was found that there was some debt due to her for the payment of which they were the security. The findings are that no debt ever existed, and this is conclusive against the plaintiff's right of action. In an action to enforce a mortgage by sale of the land, the amount, if anything, of the lien is an issue which the parties certainly have the right to contest. It is the debt which gives the mortgage vitality as a charge upon the land, and generally, where there is no debt or obligation, there is no subsisting mortgage. The instruments contain a consideration clause and a seal, and much of what has been said by courts and writers to the effect that a party cannot be permitted to defeat his own deed by parol proof is based upon the importance which was attached to the presence of these conditions in an instrument by the common law. The conception that some consideration was necessary to support every promise and covenant was borrowed from the civil law, but the consideration was formerly deemed to be conclusively established by the presence of the consideration clause and the seal. It was originally supposed that the recitals and clauses of a contract expressing a consideration could not be raised by parol proof to the contrary, but that rule was gradually abandoned, and now that clause is open to parol proof. *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103; *Hebbard v. Haughian*, 70 N. Y. 54; *Ham v. Van Orden*, 84 N. Y. 269. So, also, the conclusive presumption of a consideration which formerly arose from the presence of a seal was modified by statute, and it is now open to the maker of such an instrument to allege and prove the absence of any consideration in fact as a defense. 3 Rev. St. (5th Ed.) p. 691, §§ 77, 78; Code, § 840.

There are, it is true, expressions to be found in some cases to the effect that while the question of consideration is open to be raised by parol proof, yet the party cannot be permitted to claim that a deed or other instrument with a consideration clause or a seal, or both, is

wholly without consideration, and thus entirely defeat it. If this idea is anything more than a somewhat shadowy and fanciful remnant of the ancient law, it is not easy to define its precise scope or practical application when applied to an executory instrument like a mortgage. To say that in a case like this it is open to the defendant to reduce by parol proof the sum expressed as the consideration to one dollar or any other nominal sum, but that he cannot go any further, would be to confess that the distinction, if it exists, is altogether without substance. The instrument would be defeated in either case. It is quite certain that by recent adjudications deeds and other instruments have been defeated, in a great variety of cases, by parol proof of want of consideration, or that they were delivered upon conditions which would render their use for any other object a fraud upon the maker, or that the purpose for which delivery was made was different from that indicated upon their face. It will be sufficient to refer to some of the cases without further comment. *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127; *Blewitt v. Boorum*, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600; *Andrews v. Brewster*, 124 N. Y. 433, 26 N. E. 1024. So, also, actions to foreclose mortgages have been defeated upon allegations and proof differing in no substantial respect from that appearing in this case. *Briggs v. Langford*, 107 N. Y. 680, 14 N. E. 502; *Hannan v. Hannan*, 123 Mass. 441, 25 Am. Rep. 121; *Wearse v. Peirce*, 24 Pick. (Mass.) 141; *Hill v. Hoole*, 116 N. Y. 299, 22 N. E. 547, 5 L. R. A. 620; *Davis v. Bechstein*, 69 N. Y. 440, 25 Am. Rep. 218; *Parkhurst v. Higgins*, 38 Hun, 113.

There may be cases, no doubt, where the party will be held estopped by his deed from claiming that it is void for want of consideration, especially where by its terms it appears to be an absolute conveyance of land. In *re Mitchell*, 61 Hun, 372, 16 N. Y. Supp. 180. A voluntary conveyance, intended to take effect as such, and not executory, is generally good between the parties without actual consideration, but that principle has no application to this case. It is not quite correct to say that the defendant was permitted to show by parol that these instruments were never to have any operation or effect. They were in fact executed and delivered for a purpose, though not to secure the payment of money, and they may have accomplished the very object contemplated. That was to protect the defendants against their own improvidence in contracting debts upon the faith of their title to the farm. Whether that purpose was lawful or practicable or possible, or the contrary, is quite foreign to the inquiry. It is enough to know that such was the motive and consideration in the minds of all the parties which induced the execution and delivery and no other.

Having procured them in that way, it would be unconscionable now for the mortgagee or his personal representative to use or enforce them as obligations for the payment of money. The defendants had been in possession of the farm under the final contract between them and their father to convey it to them, in consideration of the amount found

due upon the settlement, for more than a year before the deeds or mortgages were given. During that time they were in a position to enforce specific performance, and hence the execution and delivery of the mortgage were purely voluntary acts on their part, and constituted, so far as appears, no element of the consideration for the deeds. The acts and declarations of the mortgagee with respect to the consideration, conditions, and purpose under which the instruments were made and delivered, being admissions against his interests, would have been competent proof against him in a suit to enforce the mortgages in his lifetime, and hence are now competent against the plaintiff, who represents him. *Holmes v. Roper*, 141 N. Y. 67, 36 N. E. 180; *Lyon v. Riker*, 141 N. Y. 225, 36 N. E. 189; *Hobart v. Hobart*, 62 N. Y. 80. We think there was no error in the result, and that the judgments should be affirmed, with costs.

BARTLETT, J., concurs. PECKHAM and GRAY, JJ., concur in the result. ANDREWS, C. J., dissents. HAIGHT, J., not sitting.

Judgments affirmed.

V. Sale of the Mortgaged Property *

1. PURCHASE OF EQUITY OF REDEMPTION BY MORTGAGEE

DE MARTIN v. PHELAN.

(Supreme Court of California, 1897. 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115.)

Department 2. Appeal from superior court, city and county of San Francisco; James V. Coffey, Judge.

Action by Francesca L. De Martin against Alice Phelan and others, executors of the will of James Phelan, deceased. Judgment for defendants on demurrer to the complaint, and plaintiff appeals. Affirmed.

TEMPLE, J. This appeal is from a judgment upon demurrer to the complaint. The complaint contains averments to the effect that, on the 4th day of November, A. D. 1881, plaintiff owned a certain tract of land, which was then subject to mortgage liens then owned by James Phelan. The amount due on said mortgages was \$196,000. The real estate was worth \$390,375. The plaintiff and her 13 children were in indigent circumstances, destitute of available means of support, in great need, and unable to secure an additional loan upon said land, or to sell the same, owing to financial stringency then prevailing, and were wholly dependent upon the charity of others. Said Phelan knew of her distressed condition, and also that her equity of redemption was worth at least \$45,500. Still, designing to take ad-

* For discussion of principles, see Burdick, Real Prop. § 196.

vantage of her distress and necessities, he first offered her \$4,000, and then \$10,000, and finally \$19,000, for her equity of redemption. The offers were successively made on different days, and in the meantime said Phelan had her property advertised for sale, under execution, on a decree of foreclosure of said mortgages, and had the sale postponed repeatedly, for the purpose of securing her equity of redemption for a sum greatly disproportionate to its value, by taking an oppressive and unfair advantage of her necessities and distress. That on the 4th day of November, 1881, decedent made her the offer of \$19,000, and threatened to proceed with the sale unless she accepted it. Compelled by her distress and necessities, she finally did accept said offer, and conveyed her equity to him for said sum. That she did not know that decedent had taken such advantage, or that he knew of her necessities and distress at that time, but that she discovered such fact on the 27th day of December, 1887. It is averred that, when defendant falsely represented that he would sell said property unless she accepted \$19,000 for her equity, decedent did not intend to sell said property, but had in fact determined not to sell the same, unless he was unable to procure plaintiff's interest for \$45,500; that he fully intended to offer her \$45,500 for her equity, if he could not procure it for less; that this intention was concealed from plaintiff, and decedent knowingly and designedly took advantage of her said necessities and distress.

A great many objections are made to this complaint, but I do not deem it essential to consider any of them, except the general objection that it states no cause of action. That the complaint does not state a cause of action is quite obvious. The facts constituting the supposed fraud are: (1) Plaintiff was without available means, and in great financial distress. (2) Decedent had obtained a judgment foreclosing mortgage liens upon her land amounting to \$196,000. Her land was worth much more than this, but, owing to a temporary stringency in the money market, she could not borrow more money upon the land, or sell it for more than the mortgage debt. (3) Decedent knew that her equity of redemption was worth \$45,500, and was willing to pay her that for it if he could not get it for less, but concealed from her his estimate of its value, and his willingness to pay that sum provided she would not take less. (4) He caused the property to be advertised for sale under the decree, and then caused the sale to be repeatedly postponed, in the meantime making her successive offers for her equity of \$4,000, \$6,000, \$10,000, and \$19,000, which last offer she accepted in ignorance that deceased would have given her more had she insisted upon it and induced by her necessities and fears of losing her property in case of a sale under the decree.

It is impossible to believe counsel serious in their contention that it constituted fraud or oppression on the part of Phelan to conceal from her the fact that he intended to offer her as much as \$45,500 for her

equity, if he could not succeed in getting it for less. It would constitute a new departure, both in business and legal ethics. If the obligation to make such disclosures rested upon Phelan, of course the like obligation rested upon the plaintiff to state to Phelan the very least sum her necessities could induce her to accept rather than permit a sale. Negotiations under such conditions would surely be novel. The real point in the case is, I presume, that the relations between mortgagor and mortgagee are in a sense fiduciary, and the mortgagee must obtain no advantage over the mortgagor by the use of the least unfairness or oppression; and it is maintained that it was oppression on the part of Phelan to get the property for an inadequate price, taking advantage of her necessities.

1. In the first place, the relation between the parties was in no sense fiduciary. At common law the mortgagee, at least after condition broken, was the legal owner, and could oust the mortgagor. He was really a trustee. Under our system he occupies no such position, and ordinarily has no control over the mortgaged estate. In those cases in which he is, by the mortgage, given some power or control over the estate before foreclosure, the old rule may prevail. There is nothing to show the nature of the mortgages formerly held by Phelan, nor does it now matter. When the wrongs detailed in the complaint were enacted, the mortgages had been foreclosed, and Phelan had only his decree. It does not appear that a receiver had been appointed, or that proceedings to that end were threatened.

2. The sale, even after the decree was obtained, was not hastened. The negotiations between the parties were protracted and deliberate. Plaintiff was fully aware of the situation, and knew all the essential facts of the case. The sale was adjourned many times, and successive offers were made to her for her equity. She says she was threatened with a sale under the decree if she did not sell. Of course, she knew, without being told, that such sale was inevitable if she did not pay the debt or sell her equity. The financial stringency was not brought on by Phelan. It is not charged that he interfered to prevent her selling to another, or to prevent the obtaining of a loan. I can discover no element of fraud, oppression, or unfairness in the case. The judgment is affirmed.¹⁰

We concur: HENSHAW, J.; McFARLAND, J.

¹⁰ It is a well-established rule that the mortgagor may sell the equity of redemption to the mortgagee, if the transaction is marked with good faith and supported by a valuable consideration. *Thornton v. Pinckard*, 157 Ala. 206, 47 South. 289 (1908); *Wilson v. Vanstone*, 112 Mo. 315, 20 S. W. 612 (1892); *Barnes v. Brown*, 71 N. C. 507 (1874); *Raski v. Wise*, 56 Or. 72, 107 Pac. 984 (1910); *Young v. Miner*, 141 Wis. 501, 124 N. W. 660 (1910). In North Carolina it has been held (*McLeod v. Bullard*, 86 N. C. 210 [1882]; *Id.*, 84 N. C. 515 [1881]) that, where the mortgagee buys the equity of redemption from his mortgagor, the law presumes fraud, and that the burden of proof is on the mortgagee to show the fairness and good faith of the transaction. This view, however, is not in accord with decisions elsewhere; it being gen-

VI. Assignment of Mortgages ¹¹

MULCAHY v. FENWICK.

(Supreme Judicial Court of Massachusetts, 1894. 161 Mass. 164, 36 N. E. 689.)

Report from supreme judicial court, Suffolk county; J. B. Richardson, Judge.

Bill by Bridget Mulcahy and another against Joseph B. Fenwick and others to compel defendants to discharge a mortgage and to surrender a note. The case was reported to the supreme court. Decree for defendants.

At the hearing in the superior court, Richardson, J., found the following facts:

"In or about the year 1885 the plaintiff Mrs. Mulcahy became the owner, in her own right, of a parcel of land, with the buildings thereon, situated in the city of Chelsea. Her husband, Daniel Mulcahy, transacted all the business relating to the said estate for her; she signing all deeds and documents, whenever it was necessary (not being able to read or write), by making her mark. About December 1, 1888, when the plaintiffs were erecting a house on said land, one Eben Hutchinson, an attorney at law, and judge of the police court of Chelsea, went upon said premises, and asked Mr. Mulcahy if he desired to borrow some money. Mr. Mulcahy replied that he might want some money in a few days. Shortly after, Mulcahy called at Hutchinson's office, in Chelsea; and the result of the interview between Mulcahy and Hutchinson was that Hutchinson agreed to loan the plaintiffs \$1,100 in money, and also to assume and pay a mortgage of \$1,700 held by Messrs. Slade & Griffin upon said estate of the plaintiffs, and Mulcahy agreed that the plaintiffs would give Hutchinson a note for the \$2,800 secured by a mortgage on said estate. In pursuance of this agreement, on or near the 7th day of December, 1888, the said Hutchinson loaned the plaintiffs, in cash, the sum of \$1,100, paying the same in several sums at different times, the first sum being paid on December 7, 1888, and later the said Hutchinson paid and discharged the said Slade & Griffin mortgage, of \$1,700; and on the 7th day of December, 1888, the plaintiffs signed a note for \$2,800, and executed a mortgage upon the aforesaid land in Chelsea for a like sum, as security for said note, and gave the note and mortgage to said Hutchinson. Said note and mortgage were made to run from

erally held that there is no presumption of fraud, and that the parties do not stand in fiduciary relations, but are on the ordinary footing of vendor and purchaser. See *Walker v. Farmers' Bank*, 8 Houst. (Del.) 258, 10 Atl. 94, 14 Atl. 819 (1888); *Knight v. Marjoribanks*, 2 Hall & T. 308, 47 Eng. Reprint, 1700.

¹¹ For discussion of principles, see Burdick, Real Prop. § 197.

the plaintiffs to one Henry Hunt Letteney. Said Henry Hunt Letteney executed an assignment of said mortgage and note on December 8, 1888, to Joseph B. Fenwick, one of the defendants.

"The terms and conditions upon which the money was loaned were fixed by said Hutchinson and Mulcahy, and without the knowledge of said Fenwick, excepting that said Fenwick had asked said Hutchinson to get a mortgage of \$2,800 for him, and had been told by said Hutchinson that he had a mortgage, or would get one for him. The note and mortgage deed were drawn by said Hutchinson, or one of his clerks at his office, and were executed by the plaintiffs at his office, and left there with Hutchinson; and the mortgage was taken to the Suffolk registry of deeds by said Hutchinson and recorded on December 8, 1888, and the assignment was taken to said registry by said Hutchinson and recorded on December 13, 1888. Said mortgage and assignment were taken from the registry by said Hutchinson about ten days after each had been left there to be recorded, and the mortgage and assignment, together with the note and an insurance policy, were delivered by said Hutchinson to Fenwick at Fenwick's house, in Chelsea. The sum of \$2,800 was given by said Fenwick to said Hutchinson at about that time. Eleven hundred dollars, which was the money part of the consideration, was paid to said Mulcahy by said Hutchinson, in three different sums, at different times; the first sum being paid on December 7, 1888, at Hutchinson's office. Since the delivery of said mortgage, note, assignment, and policy to said Fenwick by said Hutchinson, as aforesaid, the same have ever since remained in the possession of the said Fenwick, either at his house or in his safe-deposit vault; and neither of said papers, since they were delivered by said Hutchinson to said Fenwick, have ever been in the possession of said Hutchinson, but have remained exclusively in the possession of said Fenwick. Hutchinson was the only party the plaintiffs believed to have any interest in the note. The plaintiffs never had any talk with said Letteney until after the said Hutchinson had absconded, and the plaintiffs never had any conversation with said Fenwick until about July, 1892, when said Fenwick, for the first time, stated to them that he held a mortgage upon their said premises.

"Said Mulcahy paid to Hutchinson the interest on said note of \$2,800 from time to time, and also the principal sum in installments, and received therefor receipts, copies of which are hereto attached, marked 'A,' 'B,' 'C,' 'D,' 'E,' 'F,' and 'G,' the signatures to the said receipts being in the handwriting of said Eben Hutchinson; there being included in one or two of said receipts interest on a further loan of \$100, made in January, 1889, by said Hutchinson to the plaintiffs, which loan the plaintiffs afterwards paid to said Hutchinson in full; the said \$100 loan, however, being in no way connected with the said note and mortgage for \$2,800. At the times when Mulcahy

made said payments to Hutchinson, he saw Hutchinson have a note with the figures '\$2,800' in the left-hand corner, and his signature at the bottom; and said Hutchinson appeared to write on the back of the note, sometimes saying to Mulcahy: 'You don't need a receipt. This indorsement will answer.' Said Fenwick received from said Hutchinson the sums of money indorsed on the back of the said \$2,800 note held by Fenwick, and received no more money from any source on account of said note. The indorsements on the back of this note held by Fenwick are all in his handwriting. These indorsements of interest were made by said Fenwick on or about the dates when the various sums of interest were paid to him by said Hutchinson.

"If the statements of said Hutchinson to Fenwick are admissible in evidence, it is shown and admitted that he stated to said Fenwick, at the time that he made the first payment of interest, that he (Hutchinson) was having other money transactions with said Mulcahy, that said Mulcahy was indebted to him on other matters, and that he (Hutchinson) would see that said Fenwick received his interest. No talk ever took place between said Fenwick and said Hutchinson in regard to payments of any part of the principal. Mulcahy paid the principal, in various installments, to said Hutchinson, as appears from the said receipts; the last being March, 1891. Said Henry Hunt Letteney, to whom the mortgage and note were made payable, was a clerk or scrivener in the said Hutchinson's office, and had no pecuniary interest whatever in said note and mortgage, and no part of the consideration came from him or through his hands; and he simply allowed his name to be used at said Hutchinson's request, as he was accustomed to do. It did not appear that said Fenwick ever had any conversation with said Hutchinson relating to the use of said Letteney's name, or in fact knew why it was so used, or made any inquiries of said Hutchinson in regard to the name. Said Fenwick never, in express terms, authorized said Letteney or said Hutchinson to collect any part of the principal; and the said Mulcahy never had any conversation with the said Hutchinson or the said Letteney as to why the mortgage was made to run to said Letteney, instead of to said Hutchinson. In July, 1892, Joseph B. Fenwick, the defendant, called at the plaintiffs' house, and informed them that he held a mortgage for \$2,800 on their estate aforesaid. That was the first notice that the plaintiffs had that Fenwick, or any one except Hutchinson ever had an interest in the note and mortgage, although Fenwick and Mulcahy both lived in Chelsea, and Fenwick knew where Mulcahy lived. It was the first actual notice that the plaintiffs had received that said mortgage had been assigned.

"When said note for \$2,800 was delivered to Fenwick by Hutchinson, it was not indorsed, and remained unindorsed until after its maturity, to wit, in January, 1892, the defendant Joseph B. Fenwick

supposing that he had a good title to the note. After the maturity of the note, he took it to said Letteney, and requested him to indorse it, which he did, writing upon the back of the note these words: 'Pay to Joseph Fenwick without recourse. Henry Hunt Letteney.' Said Letteney made no objection to indorsing said note, and did so without consideration, when requested by said Fenwick to do so. Said Letteney testified, and I find, that the reason why he did not indorse said note before its maturity was because he was not requested by said Hutchinson to do so. Said Fenwick got the indorsement of said Letteney at the suggestion of a business acquaintance. Both Fenwick and Mulcahy had had separate previous dealings with said Hutchinson relating to real estate on several occasions. On two such occasions, Hutchinson placed \$1,500 for Fenwick on a mortgage of real estate, and in so doing received, from Fenwick, Fenwick's check for \$1,500, payable to Hutchinson. On October 1, 1888, Fenwick conveyed real estate to one Elizabeth B. Cutter through Letteney, who acted simply as conduit of title, and as Hutchinson's clerk, and at Hutchinson's request, Hutchinson being the agent or adviser or counsel of Fenwick for the purpose of completing the transaction, but none of these transactions had anything to do with the subject in controversy.

"The assignment from Letteney to Fenwick was taken by Fenwick without question; the said Fenwick having confidence in said Hutchinson on account of his official and professional standing, and his high reputation in the community. The said assignment was drawn in Hutchinson's office, executed there by said Letteney at Hutchinson's request, and in Hutchinson's presence. The defendant Joseph B. Fenwick, however, was not present when said Letteney executed said assignment, and never had any conversation concerning the same until he asked him (Letteney) to indorse the note, in January, 1892, as aforesaid. Letteney had no interest in said assignment, received no part of the consideration for it, and none of it passed through his hands; Letteney simply acting as clerk or scrivener for said Hutchinson, at Hutchinson's request. Said Mulcahy gave said mortgage to Letteney because Hutchinson presented it to him for his signature; and Fenwick received the mortgage from Letteney because it was assigned to him, and without inquiry. The defendant Mrs. Fenwick took an assignment from her husband, Joseph B. Fenwick, the defendant, of the mortgage and note, in the usual form, about August 1, 1892, without consideration, and through a third party, named McVey. About August 1, 1892, the plaintiffs requested the defendants to execute a discharge of the mortgage, and to surrender the note, and they refused to do so.

"Upon the above facts and evidence, I reserve the case for the consideration of the supreme judicial court, in banc."

BARKER, J. The case is reserved by a justice of the superior court upon facts found and reported by him, but without any determination or adjudication of the rights of the parties. The question whether Hutchinson was the agent of Fenwick, and as such agent received and collected from the plaintiffs the principal and interest of the mortgage, is one raised by the pleadings, and upon it the plaintiff has the burden of proof. The facts reported are as consistent with the theory that, in making the payments which he made to Fenwick, Hutchinson was acting for the plaintiffs or for himself alone, as that he was an agent of Fenwick. The plaintiffs must therefore be held to have failed to prove that the payments to Hutchinson were in effect payments to Fenwick. Upon the facts reported, the plaintiffs must be held to have made the payments to Hutchinson at their own risk. They had given a note and mortgage to one Letteney, who was a clerk in Hutchinson's office, and they assumed that Hutchinson was the real party in interest, and made their payments to him accordingly. The note was payable to Letteney or order in three years from its date, and on the day after its date the note and mortgage were sold for value to Fenwick, and delivered to him, and thereafter kept in his possession. The assignment of the mortgage to him purported also to assign, transfer, and set over to him the note and claim thereby secured; but the note was not indorsed by Letteney until January, 1892, after maturity. The payments of principal were made to Hutchinson on June 19, 1890, November 7, 1890, and March 17, 1891.

The plaintiffs had no actual notice of Fenwick's ownership of the note and mortgage, and he gave them no notice that he was in any way interested in the matter. As Hutchinson was not the payee of the note, he had no apparent right to receive payment upon it; and, in paying to him, the plaintiffs acted at their own risk, and must bear the loss. If the note had been nonnegotiable, instead of negotiable, and not indorsed by the payee, the result must have been the same. The plaintiffs undertook, by the terms of the mortgage, to pay the debt to Letteney "or his executors, administrators, or assigns," and, by the note, to pay it to Letteney "or order"; and they have voluntarily chosen to pay to Hutchinson, who had no right, either from Letteney or the real owner, to receive payment. They are in the position neither of the maker of a negotiable note who has paid it in due course of business to a holder who produced it in support of his authority to receive payment, nor of a mortgagor who has paid to his mortgagee, having no knowledge that he has parted with the mortgage.

The plaintiffs contend that Letteney could not maintain an action against them upon the note, because it was not delivered to him, and he paid no consideration for it; but the facts reported show that a full consideration moved to the plaintiffs for the note, and that they delivered both note and mortgage as operative instruments. The writ-

ten assignment made Fenwick the owner of the note, although it was not indorsed, and payment to a stranger did not affect his rights.

The plaintiffs also contend that Fenwick was negligent in not giving the plaintiffs notice of the assignment before the maturity of the note, and that he should therefore bear the loss. But the law does not impute negligence to the assignee of a mortgage because he does not notify the mortgagor that he has taken an assignment, or because he receives interest from a third person, who offers to see that he receives his interest, or because he does not demand payment at the maturity of the mortgage. Fenwick owed no duty to the plaintiffs in this respect, and none of his acts stated in the report require the inference that he was at fault with reference to the plaintiffs.

The result is that the plaintiffs have shown no right to have the note and mortgage canceled, and their bill should be dismissed, without prejudice to their right to redeem, on paying the principal of the mortgage, with interest, from June 7, 1892; and a decree to that effect is to be entered in the superior court. So ordered.¹²

¹² It will be noted that in the preceding case (*Mulcahy v. Fenwick*) the question of payment to the original mortgagee after the assignment of a mortgage is not raised. The payment was made to a third person, Hutchinson, who was, in fact, neither mortgagee nor assignee. With reference, however, to payments to a mortgagee after the mortgage has been assigned, the mortgagor will be protected in such payments if he has no notice, either actual or constructive, of the assignment. The mortgagor is justified, in other words, in paying to the mortgagee until he has notice of the assignment. *Rice v. Jones*, 71 Ala. 551 (1882); *Bartholf v. Bensley*, 234 Ill. 336, 84 N. E. 928 (1908); *Castle v. Castle*, 78 Mich. 298, 44 N. W. 378 (1889); *Fox v. Clpra*, 5 Kan. App. 312, 48 Pac. 452 (1896) (see, however, *Burhans v. Hutcheson*, 25 Kan. 625, 37 Am. Rep. 274 [1881]); *Robbins v. Larson*, 69 Minn. 436, 72 N. W. 456, 65 Am. St. Rep. 572 (1897); *Van Keuren v. Corkins*, 66 N. Y. 77 (1876). In some states, however, under the recording statutes, the mere recording of an assignment is notice to the mortgagor of the assignment. *Detwilder v. Heck-enlaible*, 63 Kan. 627, 66 Pac. 653 (1901) (see, however, *Burhans v. Hutcheson*, supra); *Cornish v. Woolverton*, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598 (1905). In other states, however, a mere recording of an assignment is not notice to the mortgagor. There must be actual knowledge of the assignment. *Goodale v. Patterson*, 51 Mich. 532, 16 N. W. 890 (1883); *Robbins v. Larson*, supra; *Foster v. Carson*, 147 Pa. 157, 23 Atl. 342 (1892); *Id.*, 159 Pa. 477, 28 Atl. 356, 39 Am. St. Rep. 696 (1894). Interest coupons, when detached from the mortgage note, become transferable by indorsement apart from the note, and the fact that such coupons, when presented to the maker for payment, bear an indorsement transferring them to another, does not, in itself, constitute notice that the mortgage note has also been transferred. *McVay v. Bridgman*, 21 S. D. 374, 112 N. W. 1138 (1907). In making final payment of the mortgage debt, however, and, according to some cases, in making any partial payment on the principal, the mortgagor, who pays the mortgagee after the latter has assigned it, does so at his peril, unless he demands the production of the mortgage and note for cancellation. *Baumgartner v. Peterson*, 93 Iowa, 572, 62 N. W. 27 (1895); *Murphy v. Barnard*, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340 (1894); *Wilson v. Campbell*, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544 (1896); *Mead v. Leavitt*, 59 N. H. 476 (1879). See, however, *Olson v. Northwestern Guaranty Loan Co.*, 65 Minn. 475, 68 N. W. 100 (1896).

*(B) Priority and Notice***I. Notice by Registration¹³****1. ACTUAL NOTICE**

See *Neligh v. Michenor*, ante, p. 405.

2. PLACE OF REGISTRATION

KENNEDY v. HARDEN.

(Supreme Court of Georgia, 1893. 92 Ga. 230, 18 S. E. 542.)

Error from superior court, Gwinnett county; N. L. Hutchins, Judge. Action in ejectment by William S. Harden and others against J. R. Kennedy. A special issue was joined, and tried separately, resulting in a verdict for defendant. This verdict having been set aside, and a new trial granted, defendant brings error. Affirmed, with directions.

The following is the official report:

An action of ejectment, upon the demise of Martha A. and Mary Bagley and William S. Harden, and upon other demises, against J. R. Kennedy, for certain land in Gwinnett county, came on to be tried; and, pending the trial, plaintiffs offered in evidence a certified copy of an agreement or deed made by the heirs at law and distributees of Robert Harkness to plaintiffs, as remainder-men, to the premises in dispute. Defendant filed an affidavit, under section 2712 of the Code, alleging that, to the best of his knowledge and belief, the deed was a forgery, whereupon the trial of the case was arrested and a special issue on the affidavit made up and submitted to the jury, and a verdict rendered, finding the deed to be a forgery. Plaintiffs moved for a new trial upon the grounds that the verdict was contrary to law and evidence, and because the court erred in overruling the motion of plaintiffs' counsel to dismiss the affidavit of defendant for the reason that a certified copy of an ancient registered deed or title paper could not be attacked in this way. This motion was granted the court below, in the order granting the motion, stating that being in doubt as to the law of the case on the issue made, and the ends of justice seeming to require it, the motion was sustained. To this decision the defendant excepted. It does not appear what disposition has been made of the main case, or whether anything was done with it after the verdict on the special issue. There had been a previous verdict in favor

¹³ For discussion of principles, see *Burdick*, Real Prop. § 199.

of defendant upon his plea of the general issue, and a motion for a new trial made by the plaintiffs was overruled, and the case brought to this court, by which the decision of the court below was reversed. 85 Ga. 703, 11 S. E. 1091.

Upon the trial of the special issue as to the forgery of the paper, it was admitted that the courthouse and records of Gwinnett county, where the action was pending, were burned in 1871. The instrument in question purported to have been made in Forsyth county, by heirs and distributees of the estate of Robert Harkness, in settlement of the estate, making certain disposition of the lands which belonged to Robert Harkness, and which his widow acquired after his death, lying in Gwinnett and Forsyth counties; appointing R. W. M. Harkness trustee, etc., and bore date April 4, 1849. It appeared to be attested by one Connally, by Evaline E. Harkness, and by W. J. Lawrence, and to have been recorded in Forsyth county March 9, 1850, and in Gwinnett county July 25, 1887. The instrument was apparently signed by Dorcas, R. W. M., John C., and James P. Harkness, by W. J. and R. C. Lawrence, by William and E. A. Connally and W. J. Russell, former trustee, and appeared to have been attested by Gordon, a justice of the inferior court, as to Russell, separately from the attestation above mentioned. W. S. Harden testified that he believed the original of this agreement had been lost or destroyed; that the same was not in his power or custody; that the witnesses to it were all dead, except Connally, and he (witness) did not know whether Connally was dead or alive; that Connally moved from Georgia to Arkansas many years ago; that Elizabeth A. Harkness married William Connally; that the original never was in witness' possession, and he did not know that he ever saw it, but may have seen a copy. The following appeared from the evidence of W. S. and Harmon Bagley: Neither of them was present when the agreement was signed. R. W. M. and James P. Harkness and W. J. Lawrence, who married Rosanna C., stated to W. S. Bagley that they had made a settlement, and that R. W. M. Harkness had been appointed trustee, instead of W. J. Russell. They knew the persons who witnessed the agreement. Evaline Harkness is dead. Connally is alive, or went to Texas. W. J. Lawrence went to California, and they did not know whether he was dead or not. Gordon is dead. The witnesses did not know what had become of the original agreement, and Harmon Bagley did not remember ever seeing a copy of it. W. S. Bagley, to the best of his recollection, saw a certified copy of the original in possession of R. W. M. Harkness between 1865 and 1870. Evaline Harkness was R. W. M. Harkness' wife. W. J. Lawrence was a son-in-law of Robert Harkness. W. J. Russell was trustee for Dorcas Harkness and her children, appointed by the will, for the property of the estate of Robert Harkness willed to his wife, Dorcas, and her children. It further appeared that the certified copy had been compared with the original record in Forsyth

county, and found to be an exact copy, and that W. J. Russell is dead. For the defendant, only one witness, E. A. Connally, was introduced. He testified that he had never heard of an agreement, and never signed any agreement whatever; that he never signed any title to the lands; that he was acquainted with Wils Connally, one of the alleged attesting witnesses, with Evaline Harkness and W. J. Lawrence, and they were all dead, so far as he knew.

BLECKLEY, C. J. The Code, in section 2712, provides that "a registered deed shall be admitted in evidence in any court in this state without further proof, unless the maker of the deed, or one of his heirs, or the opposite party in the cause, will file an affidavit that the said deed is a forgery, to the best of his knowledge and belief, when the court shall arrest the cause and require an issue to be made and tried as to the genuineness of the alleged deed." The issue which this provision contemplates can be raised only when there is a deed produced which is registered, and which, on account of its registration, is admissible in evidence on the trial of the main cause. Here no deed was produced which had been registered. The document produced was a certified copy of a deed registered in Forsyth county, the copy being authenticated as one made from the record of deeds in that county. This copy, as we infer from the transcript before us, had been recorded in Gwinnett, the county in which the suit was pending. But there is no statute, and never has been, so far as we are aware, authorizing a certified copy taken from the record of deeds in one county to be recorded in another county. The scheme of the recording acts is to record the originals of deeds, not copies of them, though, probably, in the case of lost or destroyed deeds, a duly-established copy might be recorded the same as an original. Although the deed recorded in Forsyth county conveyed land lying in that county, as well as the tract lying in Gwinnett, and now in controversy, the original, even if it had been produced, would not have been admissible in evidence as a registered deed, so far as the land in Gwinnett county is concerned, for it had not been recorded in Gwinnett, but only in Forsyth; and, while this record was good as to the Forsyth lands, it had no efficacy as to the Gwinnett land, for the place of recording deeds is the county in which the land lies. Code, § 2705. Where the same deed embraces land in two or more counties, it must be recorded in each of the counties, in order to render it admissible in evidence as to all the land it covers. If recorded in one county only, that recording is good as to the land lying therein, but not as to the other lands. It is manifest, we think, that the section of the Code above quoted has been misconstrued and misapplied in this proceeding, the facts not being such as to warrant the raising or the trial of a separate issue of forgery.

2. The whole proceeding being outside of the statute under which the issue was formed and tried, it was not error to set aside the ver-

dict, but a new trial would be idle and fruitless. Therefore, direction is given that the affidavit raising the issue be dismissed. Judgment affirmed, with direction.

3. TO WHOM RECORD IS NOTICE

MORSE v. CURTIS.

(Supreme Judicial Court of Massachusetts, 1885. 140 Mass. 112, 2 N. E. 929, 54 Am. Rep. 456.)

MORTON, C. J. This is a writ of entry. Both parties derive their title from one Hall. Hall mortgaged the land to the demandant, August 8, 1872. On September 7, 1875, Hall mortgaged the land to one Clark, who had notice of the earlier mortgage. The mortgage to Clark was recorded January 31, 1876. The mortgage to the demandant was recorded September 8, 1875. On October 4, 1881, Clark assigned his mortgage to the tenant, who had no notice of the mortgage to the demandant. The question is, which of these titles has priority? The same question was distinctly raised and adjudicated in the two cases of *Connecticut v. Bradish*, 14 Mass. 296, and *Trull v. Bigelow*, 16 Mass. 406, 8 Am. Dec. 144. These adjudications establish a rule of property which ought not to be unnoticed, except for the strongest reasons. It is true that in the late case of *Flynt v. Arnold*, 2 Metc. 619, Chief Justice Shaw expresses his individual opinion against the soundness of these decisions; but in that case the decision of the court was distinctly put upon that ground, and his remarks can be only considered in the light of dicta, and not as overruling the earlier adjudications.

Upon careful consideration, the reasons upon which the earlier cases were decided seem to us the more satisfactory because they follow the spirit of our registry laws and the practice of the profession under them. The earliest registry law provides that no conveyance of land shall be good and effectual in law "against any other person or persons but the grantor or grantors, and their heirs only, unless the deed or deeds thereof be acknowledged and recorded in manner aforesaid." St. 1783, c. 37, § 4. Under this statute the court, at an early period, held that the recording was designed to take the place of the notorious act of livery of seizin, and that though by the first deed the title passed out of the grantor as against himself, yet he could, if such deed was not recorded, convey a good title to an innocent purchaser who received and recorded his deed. But the court then held that a prior unrecorded deed would be valid against a second purchaser who took his deed with a knowledge of the prior deed, thus ingrafting an exception upon the statute. 3 Mass. 575; *Marshall v. Fisk*, 6 Mass. 24, 4 Am. Dec. 76. This exception was adopted on the ground that it was a fraud in the second grantee to take a deed if he had knowledge

of the prior deed. As Chief Justice Shaw forcibly says in *Lawrence v. Stratton*, 6 Cush. 163, the rule is "put upon the ground that a party with such notice could not take a deed without fraud; the objection was not to the nature of the conveyance, but to the honesty of the taker, and therefore, if the estate had passed through such taker to a bona fide purchaser without fraud, the conveyance was held valid." This exception by judicial exposition was afterwards ingrafted upon the statute, and somewhat extended by the legislature. Rev. St. 59, p. 28; Gen. St. c. 59, § 31; Pub. St. c. 120, § 4. It is to be observed that in each of these revisions it is provided that an unrecorded prior deed is not valid against any person except the grantor, his heirs and devisees, "and persons having actual notice of it." The reason why the statutes require actual notice to a second purchaser, in order to defeat his title, is apparent; its purpose is that his title shall not prevail against the prior deed if he has been guilty of a fraud upon the first grantee, and he could not be guilty of such fraud unless he had actual notice of the first deed.

Now, in the case before us, it is found as a fact that the tenant had no actual knowledge of the prior mortgage to the demandant at the time he took his assignment from Clark. But it is contended that he had constructive notice, because the demandant's mortgage was recorded before such assignment. It was held in *Connecticut v. Bradish*, supra, that such record was evidence of actual notice, but was not of itself enough to show actual notice, and to charge the assignee of the second deed with a fraud upon the holder of the first unrecorded deed. This seems to us to accord with the spirit of our registry laws, and the uniform understanding of and practice under them by the profession. These laws not only provide that deeds must be recorded, but they also prescribe the method in which the records shall be kept and indexes prepared for public inspection and examination. Pub. St. c. 24, §§ 14-26. There are indexes of grantors and grantees, so that, in searching a title, the examiner is obliged to run down the list of grantors or run backward through the list of grantees. If he can start with an owner who is known to have a good title, as in the case at bar he could start with Hall, he is obliged to run through the index of grantors until he finds a conveyance by the owner of the land in question. After such conveyance the former owner becomes a stranger to the title, and the examiner must follow down the name of the new owner to see if he has conveyed the land, and so on. It would be a hardship to require an examiner to follow in the index of grantors the name of every person who at any time, through, perhaps, a long chain of title, was the owner of the estate.

We do not think this is the practical construction which lawyers and conveyancers have given to our registry laws. The inconvenience of such a construction would be much greater than would be the inconvenience of requiring a person who has neglected to record his prior deed for a time, to record it, and to bring a bill in equity to set

aside the subsequent deed, if it was taken in fraud of his rights. The better rule, and the least likely to create confusion of titles, seems to us to be that if a purchaser, upon examining the registry, finds a conveyance from the owner of the land to his grantor which gives him a perfect record title, complete by what the law at the time it is recorded regards as equivalent to a livery of seizin, he is entitled to rely upon such recorded title, and is not obliged to search the record afterwards made, to see if there has been any prior unrecorded deed of the original owners.

This rule of property, established by the early case of *Connecticut v. Bradish*, *supra*, ought not to be departed from unless conclusive reasons therefor can be shown. We are therefore of opinion that in the case at bar the tenant has the better title. Verdict set aside.

DOW v. WHITNEY.

(Supreme Judicial Court of Massachusetts, 1888. 147 Mass. 1, 16 N. E. 722.)

Appeal from supreme judicial court, Suffolk county.

Bill in equity by Celende T. Dow against Henry M. Whitney, to compel specific performance of an agreement to purchase a tract of land in Brookline. The defendant objected to the plaintiff's title on the ground that it was subject to possible unrecorded deeds of one Stephen Dow, under whom the plaintiff claimed, and to unrecorded deeds of Alfred A. Dow, under whom also the plaintiff claimed. The supreme judicial court, after a hearing, ordered the defendant to carry out his part of the agreement, and he appealed. The facts sufficiently appear in the opinion.

MORTON, C. J. Stephen Dow, by his deed dated October 1, 1878, conveys to "Alfred A. Dow, his heirs and assigns, all my interest in all that lot of land, with the buildings thereon, situated on Corey hill, in Brookline." Then follows a description of the lot by metes and bounds. After the description is the following: "Being the same premises conveyed to me by S. A. Robinson et al., also by Otis Withington, by deed dated November 2, 1857, and recorded with Norfolk Deeds, book 261, page 279;" "hereby conveying to said grantee all the land conveyed to me by the deeds aforesaid, except such portions thereof as I have heretofore sold." The deeds from Robinson and Withington conveyed to Dow a large tract of land, which included the premises in question, and he had, before this deed of the premises was made, conveyed portions of this larger tract, by deeds duly recorded. It is clear that the clause last quoted, was not intended to limit the prior granting clause of the deed, or to alter the description, but was inserted for the purpose of showing the grantor's chain of title. *Lovejoy v. Lovett*, 124 Mass. 270.

The principal question in this case is whether the deed of Stephen Dow conveyed to the grantee a title which is superior to that of any

grantee by a prior unrecorded deed of the grantor. This question was fully considered and discussed in *Woodward v. Sartwell*, 129 Mass. 210. In that case it was held that a deed by an officer, upon a sale on execution, of "all the right, title, and interest" of the judgment debtor in land specifically described in the deed, took precedence of a prior unrecorded deed of the judgment debtor, and conveyed to the purchaser a good title. The court put the decision upon the ground that an attaching creditor has the same standing as a bona fide purchaser, and that the deed of the officer "is equivalent to a conveyance made by the debtor at the time the attachment was made; and in the case at bar, as the record title then stood in the name of the debtor, as to bona fide purchasers, he was the owner of the land." We are satisfied that these views are correct. We can see no sound distinction between a deed made by an officer upon a sale on execution, and a deed made by the debtor himself. In either case the deed conveys all the title which the debtor had, and no more; but a prior unrecorded deed has no effect except as between the parties to it, and others having notice of it, and, as to creditors and purchasers, leaves the title in the grantor. *Earle v. Fiske*, 103 Mass. 491. A deed of "all the right, title, and interest," or of "all the interest," of the grantor in a lot of land, conveys the same title as a deed of the land. It is the policy of our laws that a purchaser of land, by examining the registry of deeds, may ascertain the title of his grantor. If there is no recorded deed, he has the right to assume that the record title is the true title. The law has established the rule, for the protection of creditors and purchasers, that an unrecorded deed, if unknown to them, is, as to them, a mere nullity. The reasons for the rule apply with equal force in the case of a deed of the grantor's right, title, and interest, as of a deed of the land.

We are of opinion, therefore, that the deed of Stephen Dow conveyed to his grantee a title which is good against any prior deed, if unrecorded. To hold otherwise would defeat the purpose of the registration laws, and create confusion in the titles to lands. It is to be noticed that the deed in this case contains a specific description of the land intended to be conveyed, and contains the usual covenants of warranty. The case is thus distinguished from a class of cases relied upon by the defendant, in which it has been held that, where a deed contains no particular description, but only a general description, like "all my land," or "all the land I have in Boston," or other similar general description, it does not take precedence of prior unrecorded deeds of the grantor. See *Adams v. Cuddy*, 13 Pick. 460, 25 Am. Dec. 330; *Aqueduct Corp. v. Chandler*, 9 Allen, 159; *Fitzgerald v. Libby*, 142 Mass. 235, 7 N. E. 917. In each of those cases the question was not as to the effect of a prior unrecorded deed of the same land, but it was whether the land previously sold was included within the description of the later deed. In other words, it was a question of the construction of the deed relied upon. No such question can arise in the case at bar, as the description of the land intended to be conveyed is

specific and exact. The same considerations apply to the deed from Alfred A. Dow to the plaintiff.

The defendant contends that specific performance of his contract ought not to be decreed, because, if compelled to take a conveyance, he may afterwards be exposed to litigation to defend his title. It is not known that there is any unrecorded deed made by Stephen Dow or Alfred A. Dow. The only alleged defect is that there is a possibility that there is such a deed, and that the grantee in it may hereafter appear and contest the defendant's title. The defendant ought not to be required to accept a title that is doubtful. But in this case there is no reasonable doubt that the plaintiff's deed conveys a good title. Its validity depends upon a pure question of law, and no question of fact is involved. The mere possibility that a claimant may hereafter appear, and ask the court to overturn a well-settled rule of law, is not such a defect or doubt in the title as ought to lead the court, in its discretion, to deny to the plaintiff the right in equity to a specific performance of the contract. *Hayes v. Cemetery*, 108 Mass. 400; *Chesman v. Cummings*, 142 Mass. 65, 7 N. E. 13.

As the parties agree to the form of the decree entered by the justice who heard the case, it should therefore be affirmed.

• JOHNSON v. WILLIAMS.

(Supreme Court of Kansas, 1887. 37 Kan. 179, 14 Pac. 537,
1 Am. St. Rep. 243.)

Error from district court, Elk county.

VALENTINE, J. This was an action in the nature of ejectment, brought in the district court of Elk county by D. H. Williams against Samuel M. Johnson for the recovery of certain real estate in said county. The record clearly shows that Williams is the legal owner of the land in controversy, unless his title thereto has been divested by a certain tax deed, and other proceedings founded thereon, which will be hereafter mentioned. On September 17, 1881, the aforesaid tax deed was executed by the county clerk of Elk county to Anna Eby, and was recorded on September 20, 1881. On September 20, 1881, Anna Eby executed a quitclaim deed for the land to Lark Vinson, which deed was recorded on December 10, 1881. On September 26, 1881, Vinson commenced an action in the district court of Elk county against the said defendant D. H. Williams and others to quiet his title to the property in controversy, and obtained service of summons only by publication. On December 8, 1881, a judgment was rendered in that action, quieting Vinson's title as against all the defendants in that action. On December 10, 1881, Vinson executed a quitclaim deed for the property to Richard M. Roe, which deed was recorded on December 19, 1881. On July 22, 1882, said Roe, by his quitclaim deed, remised, released, and quitclaimed unto Samuel M. Johnson, the

plaintiff in error, defendant below, all his right, title and interest in and to the land, which deed was duly recorded on July 25, 1882. On October 12, 1882, Williams filed his motion in the district court of Elk county to open up said judgment under section 77 of the Civil Code; and such proceedings were had that on November 8, 1883, the motion was sustained, and Williams permitted to defend in the action. On March 7, 1884, a trial was had in the action, and judgment was rendered in favor of Williams and against Vinson, decreeing Williams to be the owner in fee-simple of the land, and quieting his title as against Vinson and all persons claiming under him. This present action of ejectment was commenced on August 8, 1884, and was tried before the court without a jury, and judgment was rendered in favor of Williams and against Johnson for the recovery of the land and for costs; and Johnson, as plaintiff in error, brings the case to this court for review.

It is admitted that Johnson, in purchasing the property, paid value therefor, and at the time had no knowledge of the claim of Williams; or, in other words, it is admitted that Johnson was "a purchaser in good faith" of the property, provided a purchaser taking a quitclaim deed for the property can be "a purchaser in good faith." In this state a quitclaim deed to land will convey to the grantee all the rights, interests, title, and estate of the grantor in and to the land, unless otherwise specified by the deed itself. Conveyance Act, § 2; *Utley v. Fee*, 33 Kan. 683, 691, 7 Pac. 555. Such deed will convey such of the covenants of former grantors as run with the land, (*Scoffins v. Grandstaff*, 12 Kan. 467;) and the grantee in the quitclaim deed will be entitled to such further title or estate as may inure at any time to the grantees of such former grantors by virtue of such covenants as run with the land. See case last cited. But a quitclaim deed will not estop the maker thereof from afterwards purchasing or acquiring an adverse title or interest, and holding it as against his grantee, (*Simpson v. Greeley*, 8 Kan. 586, 597, 598; *Bruce v. Luke*, 9 Kan. 201, 207, et seq., 12 Am. Rep. 491; *Scoffins v. Grandstaff*, 12 Kan. 469, 470; *Young v. Clippinger*, 14 Kan. 148, 150; *Ott v. Sprague*, 27 Kan. 624;) and a person who holds only by virtue of a quitclaim deed from his immediate grantor, whether he is a purchaser or not, is not a bona fide purchaser, (*Bayer v. Cockerill*, 3 Kan. 283, 294; *Oliver v. Piatt*, 3 How. 333, 410, 11 L. Ed. 622; *May v. Le Claire*, 11 Wall. 217, 232, 20 L. Ed. 50; *Villa v. Rodriguez*, 12 Wall. 323, 20 L. Ed. 406; *Dickerson v. Colgrove*, 100 U. S. 578, 584, 25 L. Ed. 618; *Baker v. Humphrey*, 101 U. S. 494, 499, 25 L. Ed. 1065; *Runyon v. Smith* (C. C.) 18 Fed. 579; *U. S. v. Sliney* (C. C.) 21 Fed. 895; *Watson v. Phelps*, 40 Iowa, 482; *Smith v. Dunton*, 42 Iowa, 48; *Besore v. Dosh*, 43 Iowa, 211, 212; *Springer v. Bartle*, 46 Iowa, 688; *Postel v. Palmer*, 71 Iowa, 157, 32 N. W. 257; *Bragg v. Paulk*, 42 Me. 517; *Coe v. Persons Unknown*, 43 Me. 432; *Ridgeway v. Holliday*, 59 Mo. 444; *Stoffel v. Schroeder*, 62 Mo. 147; *Mann v. Best*, Id. 491; *Rodgers v.*

Burchard, 34 Tex. 441, 452, 7 Am. Rep. 283; *Harrison v. Boring*, 44 Tex. 255; *Thorn v. Newsom*, 64 Tex. 161, 53 Am. Rep. 747; *Richardson v. Levi*, 67 Tex. 359, 3 S. W. 444; *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125, 134; *Derrick v. Brown*, 66 Ala. 162; *Everest v. Ferris*, 16 Minn. 26, (Gil. 14;) *Marshall v. Roberts*, 18 Minn. 405, (Gil. 365) 10 Am. Rep. 201; *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 146, 9 Am. Dec. 736; *Smith v. Winston*, 2 How. (Miss.) 601; *Kerr v. Freeman*, 33 Miss. 292, 296; *Learned v. Corley*, 43 Miss. 688; *Leland v. Isenbeck*, 1 Idaho, 469; *Baker v. Woodward*, 12 Or. 3, 10, 6 Pac. 174, 178; *Richards v. Snyder*, 11 Or. 511, 6 Pac. 186; *Snowden v. Tyler*, 21 Neb. 199, 31 N. W. 661, 668; *McAdow v. Black*, 6 Mont. 601, 13 Pac. 377, 380, 381.

It may be that, with reference to some equities or interests in real estate the purchaser who holds only under a quitclaim deed may be deemed to be a bona fide purchaser; for equities and interests in real estate may sometimes be latent, hidden, secret, and concealed, and not only unknown to the purchaser but undiscoverable by the exercise of any ordinary or reasonable degree of diligence. It is possible, also, that a purchaser taking a quitclaim deed may, under the registry laws, be considered a bona fide purchaser with reference to a prior unrecorded deed with respect to which he has no notice, nor any reasonable means of obtaining notice. *Bradbury v. Davis*, 5 Colo. 265; *Butterfield v. Smith*, 11 Ill. 485; *Brown v. Banner Coal & Coal Oil Co.*, 97 Ill. 214, 37 Am. Rep. 105; *Fox v. Hall*, 74 Mo. 315, 41 Am. Rep. 316; *Graff v. Middleton*, 43 Cal. 341; *Pettingill v. Devin*, 35 Iowa, 344. But, contra, see *Thorn v. Newsom*, 64 Tex. 161, 53 Am. Rep. 747, and note; *Postel v. Palmer*, 71 Iowa, 157, 32 N. W. 257.

We would think that in all cases, however, where a purchaser takes a quitclaim deed, he must be presumed to take it with notice of all outstanding equities and interests of which he could by the exercise of any reasonable diligence obtain notice from an examination of all the records affecting the title to the property, and from all inquiries which he might make of persons in the possession of the property, or of persons paying taxes thereon, or of any person who might, from any record, or from any knowledge which the purchaser might have, seemingly have some interest in the property. In nearly all cases between individuals where land is sold or conveyed, and where there is no doubt about the title, a general warranty deed is given; and it is only in cases where there is a doubt concerning the title that only a quitclaim deed is given or received. Hence, when a party takes a quitclaim deed, he knows he is taking a doubtful title, and is put upon inquiry as to the title. The very form of the deed indicates to him that the grantor has doubts concerning the title; and the deed itself is notice to him that he is getting only a doubtful title. Also, as a quitclaim deed can never of itself subject the maker thereof to any liability, such deeds may be executed recklessly, and by persons who have no real claim and scarcely a shadow of a claim to the lands for which

the deeds are given; and the deeds may be executed for a merely nominal consideration, and merely to enable speculators in doubtful titles to harrass and annoy the real owners of the land; and speculators in doubtful titles are always ready to pay some trifling or nominal consideration to obtain a quitclaim deed. This kind of thing should not be encouraged. Speculators in doubtful titles are not so pre-eminently unselfish, altruistic, or philanthropic in their dealings with others as to be entitled to any very high degree of encouragement from any source. There are cases which are claimed to be adverse to the opinions herein expressed. They will be found cited in Martindale on Conveyancing, §§ 59, 285, and notes, and 12 Cent. Law J. 127.

Not wishing to decide anything further in this case than is necessary to be decided, our decision will be as follows: A person who holds real estate by virtue only of a quitclaim deed from his immediate grantor, whether he is a purchaser or not, is not a bona fide purchaser with respect to outstanding and adverse equities and interests shown by the records, or which are discoverable by the exercise of reasonable diligence in making proper examinations and inquiries.

The judgment of the court below will be affirmed.¹⁴ All the justices concurring.

¹⁴ The following note is appended to this case as reported in 14 Pac. 537:

"A deed which is but a naked release of the grantor's interest in property, though recorded, is of no effect as against a prior deed of such interest from the same grantor, though unrecorded. *Peaks v. Blethen*, 77 Me. 510, 1 Atl. 451 (1885). A quitclaim deed passes no title as against the grantor's prior, though unrecorded, conveyance. *Postel v. Palmer*, 71 Iowa, 157, 32 N. W. 257 (1887). A purchaser by such a deed is not to be regarded as a bona fide purchaser without notice. *Dodge v. Briggs* (C. C.) 27 Fed. 160 (1886); *U. S. v. Silney* (C. C.) 21 Fed. 894 (1884); *Runyon v. Smith* (C. C.) 18 Fed. 579 (1883); *Martin v. Morris*, 62 Wis. 418, 22 N. W. 525 (1885); *Raymond v. Morrison*, 59 Iowa, 371, 13 N. W. 332 (1882); *Wightman v. Spofford*, 56 Iowa, 145, 8 N. W. 680 (1881); *McAdow v. Black*, 6 Mont. 601, 13 Pac. 377 (1887); *Richards v. Snyder*, 11 Or. 501, 6 Pac. 186 (1884); *Richardson v. Levi*, 67 Tex. 359, 3 S. W. 444 (1887); *Laurens v. Anderson* (Tex.) 1 S. W. 379 (1886).

"Where a quitclaim deed is tendered by the apparent owner to one contemplating the purchase of land, it is a fact sufficient to awaken the suspicion of the latter as to the validity of the title, and to put him on inquiry, and he is chargeable with notice of such defect of title as he might readily have ascertained on inquiry. *Dodge v. Briggs* (C. C.) 27 Fed. 160 (1886). Especially is this so where the conveyance is only of the 'right, title, and interest' of the grantor. *Runyon v. Smith* (C. C.) 18 Fed. 579 (1883). Such conveyance indicates by its very form that the grantor has doubts of his title, and the grantee takes with notice that he is getting a dubious title, and is put upon inquiry as to the claim which casts doubts upon it. *Richardson v. Levi*, 67 Tex. 359, 3 S. W. 444. A party who claims title under a quitclaim deed from a grantor who had previously conveyed all his right, title, and interest in the real estate to another, and the effect of the second deed, if sustained, will be to deprive the first grantee of his title, must make a clear case of bona fides on his part before his deed will be sustained. *Hoyt v. Schuyler*, 19 Neb. 652, 28 N. W. 306 (1886). A quitclaim deed of real estate, while affording cause of suspicion, may where it appears in a chain of title on the proper records of the county, be sufficient to justify a bona fide purchaser for valuable con-

II. Notice by Possession ¹⁵

WOOD v. PRICE.

(Court of Errors and Appeals of New Jersey, 1911. 79 N. J. Eq. 620, 81 Atl. 983, 38 L. R. A. [N. S.] 772, Ann. Cas. 1913A, 1210.)

Appeal from Court of Chancery.

Bill in equity by Caroline Wood, as guardian, to foreclose a mortgage against Robert A. Price and others. From a decree (79 N. J. Eq. 1, 81 Atl. 1093) denying the petition of Jacob C. Price to have surplus money paid to him as purchaser of the mortgaged lands from Robert A. Price, in preference to the claim of Alice C. Price, wife of Robert A. Price, based upon her inchoate right of dower, and also and especially upon sequestration proceedings taken by her in a suit for maintenance against Robert A. Price, the petitioner Jacob C. Price, appeals. Affirmed.

See, also, 79 N. J. Eq. 14, 81 Atl. 664.

VOORHEES, J.¹⁶ The opinion written for the Court of Chancery by the learned Chancellor has the approval of this court, and but for the stress in argument and in the briefs filed on appeal upon points which were not particularly treated in it, it would be quite unnecessary to add in any way to the careful exposition of the principles therein set forth. A restatement of the facts is, of course, uncalled for.

The argument is made that a suit for alimony is a personal action and results in a personal decree for the payment of money; therefore, to sustain it, service of process upon the defendant within the territorial limits of the state is requisite to give the courts of such state jurisdiction to render such judgment. *Elmendorf v. Elmendorf*, 58 N. J. Eq. 113, 44 Atl. 164; *Hervey v. Hervey*, 56 N. J. Eq. 424, 39 Atl. 762. It is also further contended that the employment of the writ of sequestration in order to compel an appearance, pursuant to section 26 of the divorce act (P. L. 1907, p. 482), at once ipso facto, renders the suit a proceeding in rem, or quasi in rem. This was the view entertained by the Court of Chancery.

sideration in relying upon it as a valid conveyance. It is a bona fide purchaser for valuable consideration, and not a donee who is protected. *Snowden v. Tyler*, 21 Neb. 199, 31 N. W. 661 (1887).

"But it has also been held that a quitclaim deed is as effectual to transfer title as a grant or bargain and sale. *Packard v. Johnson* (Cal.) 4 Pac. 632 (1884), *Sheldon, J.*, dissents; *Stokes v. Riley* (Ill.) 9 N. E. 69 (1886)."

For further discussion of the question of notice in connection with quitclaim deeds, see chapter 19, p. 516, *Burdick, Real Prop.*, and cases there cited.

¹⁵ For discussion of principles, see *Burdick, Real Prop.* § 201.

¹⁶ Part of the opinion is omitted.

The defendant, however, further argues from this premise that the suit, having thus become an action in rem, the land being the res which is proceeded against, the suit, from the time of issuing the writ of sequestration, was thereby transformed into a "suit relating to or affecting the possession of or title to lands or real estate," and so falls directly within the purview of "An act respecting notice of lis pendens (Revision of 1902)" (P. L. 1902, p. 477), which act provides that "neither the issuing of a * * * subpoena or other process or writ nor the filing of a * * * bill * * * nor any proceedings had or to be had thereon * * * shall be deemed or taken to be constructive notice to any bona fide purchaser * * * of any lands or real estate to be affected thereby until the complainant * * * shall have first filed * * * a written notice of the pendency of such suit."

Conceding, for argument's sake, the correctness of the reasoning, and that the action, by the employment of the writ of sequestration and the filing of the preliminary petition for it, has been transformed from an action in personam into one in rem, as distinguished from a personal action, commenced by subpoena, but wherein sequestration had been resorted to merely by way of mesne process, for some incidental purpose, the fallacy of the proposition lies in the misconception of the general doctrine of lis pendens, and of the distinction existing between that doctrine and the doctrine of notice. Our statute, above cited, while it uses the words hereinbefore quoted, as to "constructive notice," yet a consideration of the purposes for which it was enacted will demonstrate that it took origin in order to eradicate the injustice of the old law.

Although many judicial deliverances, as well as text-writers, have stated that the doctrine of lis pendens is referable to the doctrine of notice, that view has by the best authority been denied, and as stated by Prof. Pomeroy, in his *Equity Jurisprudence*, § 633, the rule is "during the pendency of an equitable suit, neither party to the litigation can alienate the property in dispute so as to affect the rights of his opponent." In this state, this view has been adopted. Vice Chancellor Pitney, in *Turner v. Houpt*, 53 N. J. Eq. 526, 33 Atl. 28, examined and collated many authorities on that subject, and recognizes the rule above set forth, and continuing refers to the reason which led to the adoption of the statutory notice of lis pendens in the following language: "The manifest hardship of applying this necessary maxim in cases of conveyances in good faith to parties without notice led to a statutory provision for the public registry of a notice." While this case was formally overruled (55 N. J. Eq. 593, 39 Atl. 1114), yet not upon this point, and the doctrines enunciated by the learned Vice Chancellor have not been by it at all repudiated. *McMichael v. Webster*, 57 N. J. Eq. 295, at page 300, 41 Atl. 714, 73 Am. St. Rep. 630, sets forth the reasons for the reversal. Indeed, this court, in *White v. White*, 61 N. J. Eq. 629, 47 Atl. 628, refers approvingly to the case. So that, what our statute really did, not only in effect, but in words,

for it is limited in its scope to any bona fide purchaser or mortgagee, etc., was to abrogate the rule that parties to a litigation could not alienate the property in dispute as against the rights of the opposing parties to such suit.

It made the recording of such notice necessary in order to preserve the former effect of the litigation. So that the result of omitting to file and record the statutory notice under the act of 1902 left the parties free to deal with the subject-matter of the litigation untrammelled, and one acquiring an interest therein *pendente lite* is unaffected by it, provided his acquisition was made bona fide and without notice of equities.

It will thus be clear that the statute did not at all deal with the rights of persons who had notice, either actual or constructive, of equities which would bind or charge their rights. The old rules, under which the litigation itself was made to limit the rights of parties acquiring interests in the subject-matter were changed by the statute above cited, unless the statutory notice was recorded. Having now disposed of the effect of the *lis pendens* act, and shown that it does not apply to persons who do not acquire interests in the subject-matter bona fide, we must look to the situation of the parties and discover whether there was notice, either actual or constructive, to the purchaser of the property.

Jacob C. Price had purchased the premises at the foreclosure sale, on October 8, 1908. The equity of redemption had been conveyed to him by the mortgagor, his brother, in August previous, pending the foreclosure suit. Before that, the writ of sequestration had been issued and served. Now Dr. Price took the deed without the signature of the wife, whom he knew to be entitled to dower, subject to payment of the mortgage. He was, therefore, put upon inquiry as to the rights of the wife, at least so far as her strict dower interest was concerned. He was also put upon inquiry as to the lien of the writ of sequestration, by reason of the open, notorious and exclusive possession of the tenant of the property, and it is conceded that so far as the tenant's rights were concerned, he was chargeable with notice of whatever rights the tenant had to remain in the property, and which the tenant could enforce against it. All authorities are agreed that the general rule is that possession of real estate which is actual, open and visible occupation, inconsistent with the title of the apparent owner by the record and not equivocal, occasional, or for a temporary or special purpose, is constructive notice to all the world of the rights of the party in possession.

This agreement of the authorities also extends to include those equities of one who occupies as tenant that are connected with the tenancy, as the contents of and the covenants contained in the lease, and as well to interests under collateral agreements, as a contract to convey the land, or to renew the lease, etc. *Taylor v. Stibbert*, 2 Ves.

Jr. 437; *Daniels v. Davison*, 16 Ves. 249; *Allen v. Anthony*, 1 Mer. 282; *Barnhart v. Greenshields*, 9 Moore, P. C. C. 18; *Le Neve v. Le Neve*, 2 Leading Cases in Eq. 187.

In the Court of Chancery, Chancellor Runyon in *Havens v. Bliss*, 26 N. J. Eq. 363, says: "If a tenant has even changed his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title as purchaser." Now, it is the duty of a purchaser to inquire of the person in possession of the premises and ascertain the rights under which he holds, and if this duty of inquiry be disregarded, the purchaser is chargeable with notice of such facts as the inquiry, if it had been in fact made, would have revealed. 2 Leading Cases in Eq. p. 188; *Holmes v. Stout*, 10 N. J. Eq. 419, 426; *Havens v. Bliss*, *supra*; *Essex County Nat. Bank v. Harrison*, 57 N. J. Eq. 91, 40 Atl. 209.

Where the possession is that of a tenant, the authorities are conflicting as to the extent of the notice flowing from such occupancy. The English rule is that "the occupation of land by a tenant affects a purchaser of the land with constructive notice of all that tenant's rights, but not with notice of his lessor's title or rights." *Hunt v. Luck*, 1902, 1 Ch. 428, where the English cases are reviewed. Under this authority, a purchaser is charged with notice of those rights which a tenant might enforce, but not with constructive notice of the rights of some other person to whom the tenant pays rent. This rule in some of the American states has been followed, but, Prof. Pomeroy in his *Equity Jurisprudence* says: "Another and more numerous group of decisions by the courts of various states hold that a purchaser, by means of a lessee's possession, is put upon inquiry respecting all the rights and interests under which the tenant holds, and which affect the property, and is therefore charged with constructive notice of the lessor's title and estate." He concludes that the latter rule may be regarded as the American doctrine. Section 625, where the author has collected the cases. See, also, sections 615, 616, 618. This subject does not seem to have been passed upon by this court. There are, however, in the Court of Chancery, cases which approach the question.

In *Havens v. Bliss*, 26 N. J. Eq. 363, Runyon, Chancellor, writing the opinion says: "It is true there are to be found cases in this country in which the notice which possession gives is confined to a known title under which the possessor holds, but the rule is, and I see nothing to take this case out of its operation, that the occupancy of land is equivalent to notice, to all persons dealing with the title of the claim of the occupant. If a tenant has even changed his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title as purchaser. 2 Sugd. on Vend. (11th Am. Ed.) 543; *Daniels v. Davison*, 16 Vesey, 254. In *Baldwin v. Johnson*, 1 N. J. Eq. 441, the language of Lord Rosslyn, in *Taylor v. Stibbert*, 2 Ves.

Jr. 440, is quoted with approbation, and applied to a case where a mortgagee had taken her mortgage on land, the legal title to which was in the mortgagor, but was subject to a trust in favor of another person, of which the mortgagee had no knowledge or information. The tenants of the mortgagor were in actual possession of the property. The court held her bound to inquire of them as to the title. The language of Lord Rosslyn above referred to is: 'It was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time that there were interests as to the extent and terms of which it was his duty to inquire.'" The same learned Chancellor in *Wanner v. Sisson*, 29 N. J. Eq. 141, denies the character of a bona fide purchaser to one who had notice of the claim of persons in possession, and says: "If they were tenants or had notice of the claims of those under whom they claim, the rule is that the occupancy of land is equivalent to notice to all persons dealing with the title of the claim of the occupant. If a tenant has even changed his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title."

In *Essex County Nat. Bank v. Harrison*, 57 N. J. Eq. 91, 40 Atl. 209, Pitney, V. C., declared "that the effect of the constructive notice due to possession is a notice of everything which a party interested in the premises would get by inquiring of the party in possession. In other words, the actual possession of the premises puts any person having a claim or seeking to acquire title thereto, to an inquiry of such person as to what his title actually is."

It seems that to give to a tenant's possession, the effect of notice of his landlord's title is the more reasonable conclusion. The possession of a tenant is the possession of the landlord. The origin and reason for the contrary doctrine are not made clear in the English cases, and although the learned judge who delivered the opinion in *Barnhart v. Greenshields*, supra, reviews the cases, not one of them referred to discusses this exact question, and his examination of them concludes: "There is no authority in these cases for the proposition that notice of a tenancy is notice of the title of the lessor; or that a purchaser neglecting to inquire into the title of the occupier is affected by any other equities than those which such occupier may insist on. Whatever authority there is upon the subject is the other way." Now an inquiry of a tenant of necessity would result in being informed of the landlord under whom the tenant occupied, and whose possession it was that the tenant held, and through whom the latter must assert whatever right he claims to retain the premises. To limit, therefore, the effectiveness of the inquiry merely to the rights of the tenant, is to deprive the notice of practical and beneficial usefulness to a purchaser, a result which must have been originally intended in the beneficent design for his protection, at the foundation of the doctrine. As Chief

Justice Field of California says, in the well-considered case of *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765, in discussing the subject: "It is not easy to give to the fact of possession, any influence as notice, without making it notice of all such matters as a prudent man desirous of purchasing the property would naturally inquire about respecting the title. Ascertaining that the possession of the occupant is that of a tenant, he would, in the ordinary course of things, proceed to inquire as to the title of the landlord."

Dickey v. Lyon, 19 Iowa, 544, contains an instructive examination of the question, and concludes: "It seems to follow, therefore, that if the possession of a tenant is notice of his lease and its contents, as the authorities uniformly concede, it must necessarily become notice of the fact that the landlord claims title and holds possession adverse to the proposed purchaser's vendor, and, having notice of such fact, he cannot become a good-faith purchaser of the estate." Another case which deals with the subject, exhaustively and satisfactorily, is *Randall v. Lingwall*, 43 Or. 383, 73 Pac. 1, in which the same result is attained. The text-books generally also regard this as the more logical and generally accepted conclusion (*Wade on Notice* [2d Ed.] § 286; *Fetter on Equity*, p. 85; *Eaton, Equity*, p. 141), and it is so held in the greater number of the states of the Union. They have been collected in 23 Am. & Eng. Ency. of Law, p. 501, and also in the notes to *Crooks v. Jenkins*, 124 Iowa, 317, 100 N. W. 82, as reprinted in 104 Am. St. Rep. at page 348. We conclude, therefore, that the possession of premises by a tenant is constructive notice, not only of such tenant's rights and equities, but as well notice of those of the landlord.

From an examination of the case, it appears that *Guerin*, the tenant, originally had a lease made in February, 1904, and duly recorded, for a term of two years, with a privilege of renewal for three additional years, and an option to purchase at any time during the demised term, and that he was in the open and actual possession of the premises. The fact that the term had expired at the time of the transfer to *Jacob C. Price* takes the case out of the rule that there is no obligation to inquire when the possession is not inconsistent with the record title, a question alluded to in *Gardom v. Chester*, 60 N. J. Eq. 238, 245, 46 Atl. 602. The tenant's occupation was not then necessarily under this lease as disclosed by the record. It was, at the best, uncertain. Besides, the character of the tenant's occupation had changed, for he had, before the transfer of title, attorned to the sheriff under the writ of sequestration, and of such change, as we have before pointed out, the purchaser had constructive notice. In executing the writ, *Guerin* was notified by the sheriff in writing, dated August 5, 1908, to attorn and pay to the sheriff arrears of rents and rents growing due for the property, so that the tenant—for he paid the sheriff afterwards on the 24th of August, \$156.50, as rent—became a tenant of the sheriff by virtue of the command of the writ. * * *

III. Notice by Lis Pendens¹⁷

See *Wood v. Price*, *supra*, p. 465.

(C) *Discharge and Foreclosure*

I. Discharge by Performance¹⁸

See *Barrett v. Hinkley*, *ante*, p. 399.

BOGERT v. BLISS.

(Court of Appeals of New York, 1896. 148 N. Y. 194, 42 N. E. 582, 51 Am. St. Rep. 684.)

Appeal from common pleas of New York city and county, general term.

Action by Henry A. Bogert, as trustee, against Elsworth L. Striker, impleaded with George Bliss and Francis B. Robert, to foreclose a mortgage. From a judgment of the general term (34 N. Y. Supp. 147) reversing an order confirming a report of referees giving him the surplus proceeds of the sale, defendant Robert appeals. Affirmed.

ANDREWS, C. J. The controversy relates to the disposition of surplus moneys arising on a foreclosure of a mortgage. One Robert claims a prior lien thereon as assignee of a mortgage made by the defendant Striker to one Weil, dated May 15, 1891, payable June 18, 1891, for \$1,000, recorded May 18, 1891. The mortgage was paid at maturity by Striker, the mortgagor, and owner of the equity of redemption, to Weil, the mortgagee, who on the same day executed and delivered to Striker a satisfaction of the mortgage, together with the bond, but the mortgage was then in the register's office, and for that reason was not delivered to Striker. The mortgage was paid in usual course, and at the time of the payment there was, so far as appears, no intention on the part of Striker, and no understanding between him and the mortgagee, that the mortgage should be kept alive. Subsequently, on July 2, 1891, Striker applied to Robert (a partner of Weil) for a loan of \$1,000, on the security of this extinguished mortgage, and the loan was made, Striker delivering to Robert at the time the bond and the satisfaction, and stating that Weil would assign the mortgage to him. The assignment was subsequently made, but not,

¹⁷ For discussion of principles, see *Burdick*, *Real Prop.* § 202.

¹⁸ For discussion of principles, see *Burdick*, *Real Prop.* §§ 203, 204.

as we infer, until after the mortgage executed to Bliss, the other claimant of the surplus. The Bliss mortgage was executed by Striker to Bliss August 28, 1891, and covered the same premises embraced in the Weil mortgage, and was given to secure a loan of \$1,500 made by Bliss to Striker, but in form was an absolute deed, and was recorded November 11, 1891. Bliss, when he took his mortgage, made no search of the title, and had constructive notice only of the Weil mortgage. The question is whether Robert or Bliss is entitled to the surplus moneys. We think the conclusion of the general term that Bliss is entitled to them is correct.

The Weil mortgage was extinguished by payment before Striker applied to Robert for a loan, and Robert had notice that the mortgage had been paid by Striker. Striker delivered to him the satisfaction executed by Weil, and there is no pretense that it did not represent the actual fact that Striker had paid the mortgage. What Striker undertook to do was to reissue the mortgage and the bond to secure another loan equal to the amount of the mortgage. Robert assented to this proposition, and made the loan on the faith of the proposed security. But there was no writing, and no actual assignment of the mortgage, until after Bliss had taken his mortgage. All that Robert had until the assignment was made was the possession of the bond and the satisfaction of the mortgage, and the verbal agreement of Striker that the mortgage should be assigned. In this state a mortgage is a lien simply, and the general principle is well settled that on payment the lien is ipso facto discharged, and the mortgage extinguished. There are many cases where, for purposes connected with the protection of the title or the enforcement of equities, what is in form a payment of a mortgage will be treated as a purchase, so as to preserve rights which might be jeopardized if the transaction was treated as a payment. But we know of no principle which permits a mortgagor who has paid his mortgage and taken a satisfaction, there being at the time no equitable reason for keeping it afoot, subsequently to resuscitate and reissue it as security for a new loan or transaction, and especially where the rights of third parties are in question. It would make no difference, in our view, whether the reissue of the mortgage was before or after new rights and interests had intervened. We do not speak of the position of a subsequent grantee or mortgagee having actual notice of the reissue of a satisfied mortgage before he takes his mortgage or deed. It is possible that the circumstances of the reissue may be such as to furnish ground for a court of equity to intervene and compel the execution of a new mortgage, to accomplish the real purpose of the parties, and notice of such circumstances to the subsequent grantee or mortgagee might, perhaps, under special conditions, subject his right to the prior equity. But the contention that a person, having at the time notice that a mortgage had been paid by the mortgagor in usual course, can, by a verbal arrangement between himself and the mortgagor, give the extinct mortgage vitality again

as security for a new loan, so as to give it priority over a subsequent conveyance or mortgage, is not justified by the authorities in this state.

The statute of frauds does not permit mortgages on land to be created without writing. The reissue of a dead mortgage, if effect is given to the transaction, is in substance the creation of a new mortgage. If this was permitted, it would furnish an easy way to evade the statute. The law wisely requires that instruments by which land is conveyed or mortgaged should be executed with solemn forms, and that their existence should be made known through a system of registry, so as to protect those subsequently dealing with the premises. Public policy requires that dealings with land should be certain, and that transactions affecting the title should be open, and that secret agreements should not be permitted by which third persons may be misled or deceived. It would be a convenient cloak for fraud if a mortgagor, having paid a mortgage, could retain it in his possession uncanceled of record, and reissue it at pleasure. A party taking from a mortgagor a reissued mortgage has notice which should put him upon inquiry, and he takes at the peril that it has in fact been paid. In the present case, not only had the mortgage been paid before Robert made his loan, but he knew the fact from incontestable evidence. If he had received an actual assignment before Bliss had taken his mortgage, he would not, we think, have been entitled to preference. Upon the facts actually existing he had merely an agreement for an assignment, which at most created an equity enforceable by equitable action; and meanwhile Bliss had obtained a legal mortgage, having no notice of the agreement. Bliss had constructive notice of the mortgage to Weil. His mortgage was subject to that incumbrance, unless the mortgage had been paid. But he did not take subject to an arrangement between Striker and Robert to revive the mortgage, the lien of which had been extinguished by payment. The case of *Mead v. York*, 6 N. Y. 449, 57 Am. Dec. 467, is a direct authority upon the question here presented. It was there held that a mortgage, after being once paid by the mortgagor, cannot be kept alive by a parol agreement as security for a new liability incurred for the mortgagor as against the latter's subsequent judgment creditors. See, also, *Cameron v. Irwin*, 5 Hill, 272; *Jones, Mortg.* § 943, and cases cited.

The appellant refers to two cases upon which he particularly relies,—*Kellogg v. Ames*, 41 N. Y. 259, and *Coles v. Appleby*, 87 N. Y. 114. *Kellogg v. Ames* was an action to foreclose a mortgage which the plaintiff, before maturity, purchased from one Douglass, who held an assignment thereof from the mortgagees, regular in form, the plaintiff paying therefor the full amount thereof. Douglass was not a party to the instrument, and he represented to the plaintiff, at the time of the purchase by the latter, that the mortgage was a valid and subsisting security, and the plaintiff purchased in reliance thereon, and took an assignment from Douglass, which he placed on record. Douglass sub-

sequently conveyed the premises to the defendant Ames. It appeared that Douglass, after the mortgage was executed, had taken a conveyance of the equity of redemption in the land from the mortgagors, subject to the mortgage which in the deed to him he covenanted to pay. It also appeared that he thereafter, and before the assignment to the plaintiff, had delivered to the mortgagees, from time to time, hardware, which by agreement they accepted in full payment of the mortgage. The case came up on findings of fact and law, and the court decided the case on the findings alone. There was no finding that when the plaintiff purchased the mortgage he knew of the payment, or that Douglass owned the land, or had bound himself to pay the mortgage. It was found that when the mortgage was paid it was the intention that the mortgage should be kept alive. In pursuance of this intention the mortgagees assigned and delivered the mortgage to Douglass. The majority of the court held that the plaintiff could enforce the mortgage, but two of the six judges who concurred in the opinion stated that, if it had been found that the plaintiff, when he took the assignment, had notice of the payment by Douglass, and of his relation to the land, they would have been of opinion that the plaintiff could not recover. So far as appears, all the judges who concurred in the judgment may have held the same view. It was held that the principle of estoppel applied upon the facts found.

This case furnishes no precedent for the claim made in the present case. It will be observed that in that case the mortgage was assigned to the plaintiff before it became due according to its terms; that it was apparently a valid security in the hands of Douglass; that the payments thereon were not made by the mortgagor, but by Douglass, with the intention and understanding at the time that it was to be kept alive, and not satisfied; that the plaintiff took the assignment in good faith and without notice, and placed his assignment on record before the conveyance by Douglass to Ames. In the present case the dealing was between Striker, the mortgagor and owner of the premises, and Robert, in respect to a past due mortgage which Robert knew had been paid. Robert doubtless supposed it could be reissued by Striker, and made his loan in reliance on Striker's consent that Weil should assign the satisfied mortgage to him as security for the loan. It was not, in fact, assigned until after Bliss had taken his mortgage.

In *Coles v. Appleby* the plaintiff claimed as assignee of a mortgage made by Benham, which one Beach procured to be assigned by the mortgagee to the plaintiff. Beach had purchased the equity of redemption in the land, and bound himself to pay the mortgage. He subsequently paid the amount to the mortgagee, but under the arrangement that the mortgage was not to be satisfied, but that it should be assigned. The court sustained the right of the plaintiff to enforce the mortgage, saying: "The right of the plaintiff to enforce the bond and mortgage does not rest upon a parol agreement to restore the mortgage, but upon the intention at the time to preserve it as a lien,

shown by the assignment thereof, and the circumstances attending the transaction."

We find no case which sustains the claim that a mortgage paid by the mortgagor, not intended to be kept alive at the time of the payment, can be thereafter reissued by him to secure another loan, made by a party cognizant of the fact, so as to give it validity as against a subsequent purchaser or mortgagee. The order of the general term should be affirmed. All concur except VANN, J., not sitting. Order affirmed.¹⁹

II. Effect of Tender of Payment ²⁰

PARKER v. BEASLEY.

(Supreme Court of North Carolina, 1895. 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231.)

Appeal from superior court, Hertford county; Armfield, Judge.

Action by A. D. Parker against J. N. Beasley and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

The defendants, J. N. Beasley and wife, Mary A. Beasley, borrowed money, and gave their promissory note for the same, payable to R. E. Beale, on January 1, 1890, and executed a mortgage, duly probated and recorded, on a certain tract of land belonging to said Mary, to said R. E. Beale, to secure the payment of their said note, with the usual power of sale in case of default in such payment; and on the 14th of April, 1891, said Beale assigned the note to the plaintiff. On the 28th of October, 1891, Beale, the mortgagee, offered said land for sale under the power and according to the provisions of said mortgage, when the plaintiff bid it off, and offered to pay by surrendering his note and mortgage. The mortgagee declined to make a deed, and the defendants did not pay the money. The defendants, on the 27th of October, 1891, or on the day of said sale, tendered to the plaintiff's authorized attorney the amount of principal, interest, and cost then due, which was refused by said attorney. It was found by the jury that there was no sale under the power in said mortgage, and that the tender was made as stated.

On the 30th of September, 1892, the plaintiff instituted this action (1) for possession of the land; (2) for judgment against defendants

¹⁹ See, also, *Lindsay v. Garvin*, 31 S. C. 259, 9 S. E. 862, 5 L. R. A. 219 (1889). A discharge in bankruptcy does not affect the mortgage lien, although it may release the personal liability of the mortgagor. *Burtis v. Wait*, 33 Kan. 478, 6 Pac. 783 (1885). Foreclosure is not payment, and does not discharge the mortgage debt, although the parties may agree that it shall constitute a discharge. *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. Ed. 456 (1885).

²⁰ For discussion of principles, see *Burdick*, Real Prop. § 205.

for the amount of said note, "to be discharged upon the surrender of the said land or the sale thereof under an order of the court, and for costs and any other necessary relief." The defendants filed an answer, averring, among other things, that on the said 27th of October, 1891, the defendants legally tendered the amount then due the plaintiff to his attorney, which was refused. The defendants prayed: First, that plaintiff recover judgment only against the defendant J. N. Beasley, and for the amount due on October 27, 1891, the date of said tender; second, that said land be discharged from any liability for the payment of said note, and that said mortgage be declared satisfied. At the trial the plaintiff had judgment for the amount of his note, with interest and costs which were due on the said day of tender, and declaring said judgment to be a lien upon said mortgaged land, with an order that after 90 days the said land be sold to satisfy said judgment, and to pay over any balance to defendants. To this judgment the defendants excepted, "because the court declined to hold that the tender discharged the lien of the mortgage on the land," and appealed.

FAIRCLOTH, C. J. A. makes a promissory note to B. for borrowed money payable on a day certain, and, to secure it, he and his wife give B. a mortgage on land, duly registered, and the money is used in improving the mortgaged premises. After maturity of the debt, and before any sale or foreclosure proceedings begun, the mortgagor tenders to the mortgagee the amount then due, principal, interest, and costs then incurred, and the mortgagee refuses to accept the tender and surrender his note and mortgage. Does this tender discharge the lien on the mortgaged land? The above statement discloses the only question presented in the record in the present action. It does not appear that the money tendered was deposited anywhere, nor that it was kept ready for the plaintiff in case of demand, nor that it was tendered at the trial. The plaintiff instituted this action for possession of the land, and to recover a judgment on the note, and for a decree condemning and ordering said land to be sold to satisfy his judgment. The defendants pleaded their tender, among other things, and relied on it as a discharge of the mortgage lien. At the trial the plaintiff had judgment for the principal money and interest and cost prior to the day of tender, and also an order to sell the land to satisfy the judgment. The defendant Beasley excepted, "because the court declined to hold that the tender discharged the lien of the mortgage on the land," and appealed. The effect of a legal tender in case the security had been wholly personal is not presented, and we express no opinion on that question; nor is the effect of a tender made before or at maturity (called the "law day" in case of a mortgage security) presented.

We are not aware that the question now before us has ever been directly presented to this court. In some of our sister states, either by statute or judicial ruling, the mortgage lien is held to be only a mere security or pledge, with the title remaining in the mortgagor, and that

a tender kept intact discharges the lien, and in some that the debt is discharged because the condition of the mortgage contract is performed, and that the title of the mortgagor is complete without reconveyance or other equivalent act. This is the result of the harsh rule of the common law. But in those states, if the mortgagor should call on the court of chancery to remove the cloud on his title, or to work out any other object, he is required to pay the debt, on the principle that he must do equity if he asks for it. In the state of New York, after several cases much considered, it was finally settled by a divided court in *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145, that a tender, although not kept good, made after the law day, at any time before foreclosure, discharges the lien. In a few other states the same doctrine prevails, but they all rest on the holding that the mortgage is a mere security or pledge, without any legal title in the mortgagee. The several decisions in such states present various phases of the question. In New York, in *Tuthill v. Morris*, 81 N. Y. 99, which was an action to restrain a sale and to have the mortgage canceled of record, on the ground that the amount of the mortgage had been duly tendered and refused, the court say: "A party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage and the costs and interest, at least up to the time of the tender. The most that could be equitably claimed would be to relieve the debtor from the payment of interest and cost subsequently accruing, and, to entitle him to this relief, he should have kept his tender good from the time it was made." And there are many similar decisions in those states.

But it is claimed that the present action is not one for equitable relief. We think this is a misapprehension. It is true that it is an action for possession, for judgment for the amount of the debt, "to be discharged upon the surrender of the said land, or the sale thereof under an order of the court, and for costs and any other necessary relief"; and the defendants, after pleading tender and refusal, pray the court "that said land be discharged from any liability for the payment of said note, and that said mortgage be declared satisfied." Here both parties are asking the court to do things which a court of law could not do. Before the constitution of 1868, neither party could get any equitable relief except by a bill in equity, but under that constitution and the Code either party can assert and obtain his equitable relief in any action at law by the other party, thus expediting business and saving costs; and the moment either party, by his pleadings, sets out and asks equitable relief, the court of equity acquires jurisdiction, clears the debt, and adjusts all equities between the parties; and this view clearly embraces the present case. In a much larger number of the states we think the rule is different from that in New York. In North Carolina the mortgagee has the legal estate, and the mortgagor is the equitable owner. Until the day of redemption is past, he may pay the money according to the proviso in the contract, and avoid the con-

veyance at law, and this is termed his legal right of redemption. After the day of redemption is past, he has still an equity of redemption, which is a continuance of his old estate. *Hemphill v. Ross*, 66 N. C. 477; *Coleb. Coll. Secur.* § 157, says there are few states where the mortgage is regarded as merely subsidiary to the debt, an incident to the principal, the shadow which follows and depends upon the substance. "This is not the view taken in this state of these relations, nor is it in harmony with the general course of adjudications elsewhere. The note is the personal obligation of the debtor. The mortgage is a direct appropriation of property to its security and payment." *Capehart v. Dettrick*, 91 N. C. 344, 353. The mortgagee may at any time take or recover possession of the mortgaged land, unless expressly forbidden by the terms of the deed or by necessary implication. 1 *Jones, Mortg.* § 58.

With this view of the mortgagee's estate and its incidents, what is the effect of the tender relied on in this case? Does it discharge the lien? The burden of showing tender and refusal is on the party pleading it. The defendants can derive no benefit from their plea of a tender, because it is not accompanied by a payment into court of the amount admitted to be due. *State v. Briggs*, 65 N. C. 159. We have also omitted to notice that a plea of tender is incomplete unless accompanied by a payment of the sum tendered into court. *Terrell v. Walker*, Id. 91. It was insisted that in the opinion of Pearson, C. J., in *Capeheart v. Biggs*, 77 N. C. 264, by the expression, "The plaintiff might invalidate a sale made under the power by proof that before the sale, or even on the day of sale, he tendered the balance due with the expenses incurred," we must assume that he meant a tender kept good by payment into court, especially, as in *Cope v. Bryson*, 1 *Winst.* 112, he had already said that defendant must plead "tender and refusal and 'always ready,' and pay the money into court, and take a rule on the plaintiff to take it or proceed further at his peril." In *Shields v. Lozear*, 34 N. J. Law, 496, 3 *Am. St. Rep.* 256, it is held: "But an unaccepted tender of the mortgage money, made after the day prescribed in the mortgage, will not affect the lien of the mortgage on the land. It is neither performance of the condition nor payment or satisfaction of the debt. Its only effect will be to stop the running of interest, and to subject the mortgagee to the costs of a redemption by bill in equity." In *Bissell v. Heyward*, 96 U. S. 580, 24 *L. Ed.* 678, it is stated that, "to have the effect of stopping interest or costs, a tender must be kept good; and it ceases to have that effect when the money is used by the debtor for other purposes." A plea of tender not accompanied by proffer in curia is bad. *Soper v. Jones*, 56 *Md.* 503. A tender after default does not discharge the lien of a mortgage, although sufficient in amount. When a tender is made after the day, it should be kept good. *Crain v. McGoon* (Ill.) 18 *Am. Law Reg.* 178; *Merritt v. Lambert*, 7 *Paige*, (N. Y.) 344; *Maynard v. Hunt*, 5 *Pick.* (Mass.) 240; *Matthews v. Lindsay*, 20 *Fla.* 973. A tender, to prevent

the running of interest, must be continuing. Using the money after refusal by the creditor to receive it destroys this attribute of a legal tender. *Gray v. Angier*, 62 Ga. 596. In tender, where the money is brought into court, and deposited and left with the plaintiff, he is entitled to cost only. *Shiver v. Johnston*, 62 Ala. 37. A tender of payment, to be effectual, must be kept good, and be ready at any time. To get the benefit of a tender, the money must be placed in the custody of the court, so that it may be awarded to the party to whom it rightfully belongs. *Frank v. Pickens*, 69 Ala. 369. The general rule is that in a plea of tender it must be accompanied with an averment that the defendant was and still is ready to pay it, and that the money is produced in court. 2 Greenl. Ev. pt. 4, 589. The payment of money into court is an admission of indebtedness to the amount paid in, and, whatever may be the result of the trial, the money belongs to the plaintiff, and the party paying it in loses all right to it. 25 Am. & Eng. Enc. Law, 943. It is seldom that a case of absolute refusal after tender is made out, for it is generally attended with circumstances that explain the refusal.

Upon the weight of current authorities, and upon general reasoning and a due regard for fair dealing, we are of opinion that the defendants' plea of tender was not available, except to stop interest and save them costs after the tender, which was accorded to them at the trial. To decide otherwise might be to let the defendants keep their money, discharge the security, and the plaintiff get nothing from any quarter. This would be monstrous. The law contemplates the payment of just debts. We see no error in the judgment below. Affirmed.

CLARK, J. (dissenting). The defendants, whose land was advertised for sale under a mortgage, tendered the creditor's attorney "all that was due and all costs." The attorney refused to take this, unless the mortgagor would in addition pay his fee. This not being done, he sold the land; the plaintiff bought, and brings this action for ejectment. The question presented is whether this tender discharged the lien, not the debt; for, if it did not discharge the mortgage, a purchaser at a sale thus made under it would acquire a good title, and mortgagors in such cases would be at the mercy of the exactions of the creditor or his counsel. This not only would subject mortgagors to a liability to be thus squeezed rather than bear the annoyance and additional cost of a sale under the mortgage with payment of the commission to the trustee for selling,—of itself often a considerable burden,—but frequently the exaction would be submitted to, rather than lose the opportunity of a private sale to a party who might buy the land if disincumbered. If a tender by the mortgagor of the full amount due will not discharge the lien, but the acceptance thereof by the mortgagee is necessary to have that effect, then the mortgagee, by declining to receive the payment, can (as in this case) add to the lien, by his own wrongful act, the costs of the sale and the commission for selling, unless he is minded to waive an actual sale by receiving payment of

the sum the commissions would amount to in addition to the sum justly due. As the parties can stipulate for the rate of commission for selling, this would simply repeal the usury law, and give the mortgagee a safe and sure mode of collecting his illegal rate of interest.

It is true that in the present case the purchaser at the sale was the holder of the mortgage, and, recognizing that he could not recover in ejectment under a purchase at a sale made under these circumstances, he changed front on the trial, and asked for a decree of foreclosure, instead of a judgment for possession. But the principle involved is the same, and the single question presented is whether a tender of the full amount due on the mortgage, with all costs, is a discharge of the lien. The hardship which would result from holding that it would not is such as must be apparent to a court of equity which looks to all possibilities of oppression. There are no direct precedents in this state, but the overwhelming weight of authority elsewhere is that such tender in full would discharge the lien, leaving, of course, the debt still valid. The carefully written *American & English Encyclopedia*, which puts into its text the prevailing and better doctrine, citing the minority decisions in the note, thus states the generally accepted doctrine: "A tender of the full amount of a debt secured by a mortgage or pledge discharges the lien of the mortgage or pledge. According to the current of authority, the lien is extinguished, though tender is not made until after default. It is not necessary, in order to effect a release, that the tender should be kept good or that the money should be paid into court." 25 *Am. & Eng. Enc. Law*, 927, 929. This is sustained in the notes by citation of a great number of authorities, especially from courts of such standing as those of New York, Michigan, Wisconsin, Massachusetts, and others, citing also the very few decisions to the contrary. To the same purport is section 893, 1 *Jones, Mortg.* (5th Ed.), which says, citing authorities: "The rule in several states is that a tender of the amount due on a mortgage after the day fixed for payment is a discharge of the lien just as much as payment is, and in the same way that a tender at common law, made upon the day named in the condition, has this effect. The lien of the mortgage is thereby ipso facto discharged, and the holder of the mortgage can only look to the personal responsibility of the person liable for the mortgage debt. To have this effect, it is not even necessary that the money should be brought into court, or that it should be shown that the tender has ever since been kept good."

It is not necessary here to cite the authorities which are there quoted to sustain the text, but in *Kortright v. Cady*, 21 N. Y. 343, 78 *Am. Dec.* 145, will be found an unusually able and full opinion showing that this was the doctrine of the common law, and that it is fully sustained by authority and reason. Not only is this doctrine supported by the weight of precedent and considerations of equity and public policy, but it is the actual contract between the parties. This,

in the usual form, provides: "If the said amount shall be paid, then this mortgage shall be null and void; otherwise, it shall remain in full force and effect." When the mortgagee as in this case tenders the "full amount due with all cost," he has in equity done all that he can do, and the mortgage lien becomes null and void by the terms of the contract. By its very condition this is so. It is otherwise as to the debt itself. There is no condition as to that. That is absolutely due, and remains due till the money is accepted. The tender can only, at most, stop the running of the interest. There is no hardship in this, as there would be in continuing in force a mortgage or other lien after tender made, with the effect of hampering any other disposition of the property or forcing the mortgagor to pay the commission and cost of a sale to prevent the property going into the hands of a purchaser who would acquire a good title at such sale if the tender does not discharge the lien. Of course, ingenious reasons can be given by counsel, based upon subtle distinctions, to the contrary, and some decisions can be found also to sustain that view; but when every cent due, principal and interest and costs, is tendered the mortgagee, he ought not in good conscience to be allowed, against the very terms of his contract, to maintain his lien, nevertheless, in full force, with the opportunity this gives of exacting (as was demanded in this case) additional sums to buy that release which he is entitled to have upon tender of the full amount due.

So much of the judgment as adjudges recovery against the debtor for the principal money, with interest and costs up to the time of the tender, should be affirmed. Neither party excepted to this. But so much of the judgment as directed a foreclosure and sale, notwithstanding the full tender made, should be reversed. By such tender the condition of the mortgage was fulfilled as fully as the mortgagor was permitted by the mortgagee to do so, and the lien was discharged by the terms of the mortgage.²¹

MONTGOMERY, J., concurs in the dissenting opinion.

²¹ Contrary to the decision of the majority of the court in the preceding case, the weight of authority is to the effect that a sufficient tender, at maturity, of the amount due, discharges the mortgage. See *Security State Bank v. Lodge*, 85 Neb. 255, 122 N. W. 992 (1909); *Breunlich v. Weselman*, 100 N. Y. 609, 2 N. E. 385 (1885); *Potts v. Plaisted*, 30 Mich. 149 (1874). The cases, however, are conflicting. See *Burdick*, Real Prop. 529. It should be observed, however, that although a good tender may discharge the mortgage, that is, the lien upon the land, yet it does not discharge the debt itself. *Cowles v. Marble*, 37 Mich. 158 (1877); *Willard v. Harvey*, 5 N. H. 252 (1830).

III. Discharge by Redemption ²²

1. WHO MAY REDEEM

EVERSON v. McMULLEN.

(Court of Appeals of New York, 1889. 113 N. Y. 293, 21 N. E. 52, 4 L. R. A. 118, 10 Am. St. Rep. 445.)

Appeal from supreme court, general term, Third department.

Action by Hannah Everson against Andrew McMullen, to recover dower. Plaintiff had judgment on appeal to the general term, and defendant now appeals to this court.

FINCH, J. We are required to settle on this appeal the disagreement between the trial court at the first hearing and the general term, and determine which decision was correct. The property in question was owned originally by Morgan Everson, who mortgaged it to the Rondout Savings Bank for \$12,000; his wife, who is the present plaintiff, joining with him in the mortgage to cover her inchoate right of dower. Everson died soon thereafter, and his executor sold the equity of redemption at public auction for one dollar. The case does not disclose the authority, upon which he acted, but nobody disputes it, and the action was tried upon the assumption that a valid title existed in the purchaser. That purchaser was Coykendall, who assigned his bid to Preston, to whom the executor's deed was made. Preston took title before August, 1877, and thereupon gave a new mortgage to the savings bank upon the property for \$2,000, to further secure an accumulation of interest upon the original mortgage. It appears that Preston gave a bond accompanying the mortgage, and so became personally liable for a possible deficiency, and the bank gained that additional security for its unpaid interest; but while it is said generally that the mortgage was given to pay the interest, it is not shown that the mortgagee accepted the new securities as a payment pro tanto upon the original incumbrance by any indorsement or equivalent action, or held them in any other way than as collateral to the original debt. In August, 1877, Preston and his wife conveyed to Crosby by a quitclaim deed, but containing a provision by which Crosby assumed and agreed to pay the \$2,000 mortgage given by Preston to the bank as a part of the consideration for the purchase. The consideration named in the deed was \$221. Preston did not on his purchase assume or become liable to pay any part of the original mortgage, but took title merely subject to its lien. When he gave his \$2,000 bond and mortgage, it was in aid of his own title, and not in pursuance of any duty due to the representatives of the mortgagor. Probably his obligation was

²² For discussion of principles, see Burdick, Real Prop. § 208.

merely collateral to the primary lien, and so both he and his land became sureties for the unpaid interest; but if not, and the new mortgage was a payment of so much of the old debt, it was entirely voluntary, and he and Crosby, who took his place, stood in the attitude of sureties, after paying the unpaid interest, entitling them to subrogation as against the land. Crosby thereafter conveyed a portion of the property to McMullen by a warranty deed, free and clear of all incumbrance. He was enabled to do this by an arrangement at the time to which his grantee and the bank were parties. The substantial point of that arrangement was a distribution of the original mortgage in agreed proportions between the two parcels into which by McMullen's purchase the land was to be divided. To effect this separation and severance of the lien McMullen gave the bank a mortgage on his parcel for \$5,500 as a substitute for \$4,000 of the principal of the original mortgage, and \$1,500 of the unpaid interest collaterally secured by the bond and mortgage of Preston, \$500 of the interest having been paid in cash by Crosby. The bank on its part formally released McMullen's parcel from the lien of its original mortgage, indorsing thereon a payment of \$4,000, and canceled and discharged the \$2,000 mortgage of Preston, and Crosby was thus enabled to make his conveyance free from incumbrance. On this state of facts the widow demanded dower in McMullen's parcel. The special term on the first trial held that she was bound to allow, as against her dower, a just proportion of the original mortgage and its interest, and sent the case to a referee, to ascertain that just proportion, with a direction that the McMullen mortgage should be recognized and allowed in ascertaining the amount of such indebtedness. The general term, on the contrary, were of opinion that the widow was not bound to contribute, and should have dower in the whole parcel, without allowance or diminution, and it is that controversy which awaits our judgment.

It is not doubtful on which side the equity exists. The widow subordinated her dower to the payment of the husband's debt. Whoever, in the room of a foreclosure by the mortgagee, pays that debt to him when under no personal liability for its discharge is entitled in equity to the protection of the mortgagee's right as against the dower which it covered and charged. The purchaser from the husband acquired only the equity of redemption. While technically he took the fee, in truth he took it subject to the interest of the mortgagee, carved out of it by the mortgage, as a lien. Payment to the mortgagee in an equitable sense is a purchase of that interest from him, and in equity the owner of the fee holds it under the mortgagee as to that interest, and under the husband only as to the equity of redemption. That is an answer to the doctrine invoked by the respondent, that a release of dower is available only to one who claims under the very title which was created by the conveyance with which the release is joined. *Malloney v. Horan*, 49 N. Y. 118, 10 Am. Rep. 335. That would be a good answer to the appellant's claim in a court of law, possibly, but

does not govern his case in equity, since there the truth of his holding outside of the legal form is under the mortgage to the extent of the mortgage debt. For his payment of that debt is not a duty which he owes to the husband's estate, or to any one, but a transaction in his own interest, the exact and obvious purpose of which is to add the right of the mortgagee to the right bought of the husband. The widow is left where her own voluntary act placed her. By joining in the mortgage she postponed her dower to the equity of redemption. She has that right still, and seeks to enlarge it because of a payment made, not by her husband, or in performance of a duty due to him or those representing him, but by one acting wholly in his own interest, and seeking to add to that as acquired from the husband the further right held by the mortgagee. The purchaser in the present case took his land charged as surety for the husband's debt. While he personally was not bound to pay it, his land was held, and, paying the debt of husband and wife as represented by the mortgage, he had a right as against them to be subrogated to the position of the mortgagee, and to stand in equity as the purchaser and holder of his security.

Thus far I have assumed that the giving of the new mortgage operated as a payment pro tanto of that held by the bank. That is a needless concession, because the finding in this case rebuts any intention of payment, and establishes that a severance of the original lien was all that was contemplated by the parties, and the giving of the new mortgage was meant in its practical effect to serve as a transfer of so much of the original lien to the severed parcel. Equity may look through the form of the transaction to ascertain its substance, and, so looking, cannot fail to see that the new mortgage is so much of the old one, in a changed form, but secures the old debt as did its predecessors. The finding is justified by the facts, and upon that basis the dower remain subject to the proportionate part of the original lien. I think these views are fully sustained by the authorities. In *Swaine v. Perine*, 5 Johns. Ch. 491, 9 Am. Dec. 318, the mortgage given by the husband and wife was outstanding at his death. The equity of redemption passed to the heir, who redeemed the land by paying the mortgage, and the widow, who claimed dower, was required to contribute her ratable proportion of the redemption money. In *Popkin v. Bumstead*, 8 Mass. 491, 5 Am. Dec. 113, the husband and wife joined in a mortgage to one Capen, and after the death of the husband his administrator, under the order of the probate court, sold the equity of redemption to Wheelock, who conveyed it to Bumstead. The latter paid off the mortgage, and it was discharged of record. The widow thereupon demanded her dower, but the court held she was barred. This case, which is very like the one at bar, was cited in *Van Dyne v. Thayre*, 19 Wend. 171, with apparent approval. Judge Cowen reviews many of the cases, and holds that *Collins v. Torry*, 7 Johns. 278, 5 Am. Dec. 273, and *Coates v. Cheever*, 1 Cow. 475, were decided without full consideration. Near the close of his opinion he

says: "My deduction from this and other cases I state in the words of Chancellor Kent, (4 Comm. 45, 3d Ed.): 'The wife's dower in the equity of redemption only applies in case of redemption of the incumbrance by the husband or his representatives, and not when the equity of redemption is released to the mortgagee or conveyed.'" I am not aware that the authority of that case has been overthrown.

The cases cited in behalf of the widow confirm, rather than question, the views we have expressed. In *Bartlett v. Musliner*, 28 Hun, 235, the purchaser had assumed and agreed to pay the mortgage debt as a condition of his purchase, and, having come under that obligation, might be deemed to have paid in behalf of the husband or his estate. The distinction is referred to in *1 Jones, Mortg.* § 866, where it is said that if the mortgage "be redeemed by the heir or purchaser, or by any one interested in the estate, who is not bound to pay the debt, to avail herself of this right she must contribute her proportion of the charge according to the value of her interest." In *Runyan v. Stewart*, 12 Barb. 537, the action was at law, and, while a majority of the court sustained the claim of dower, it was explicitly said that the result would be different in equity. In that case *Runyan* and his wife gave a mortgage, and thereafter the husband gave a conveyance to *Baker*, who assumed the payment of the mortgage. The court question the case of *Popkin v. Bumstead*, *supra*, but add that in equity *Baker* might be subrogated, and have a decree for contribution. No reference was made to the assumption of the mortgage by *Baker*. In *Jackson v. Dewitt*, 6 Cow. 316, there was a release to the mortgagee, and dower was denied. In *Wedge v. Moore*, 6 Cush. (Mass.) 8, the whole argument is founded upon an assumption of the mortgage debt by the purchaser, which is argued out from the facts. In *Platt v. Brick*, 35 Hun, 121, the action was by the purchaser of the equity of redemption, who was not bound to pay the mortgage debt, to compel the mortgagee to assign his mortgage for the protection of the purchaser's title against dower, its amount having been tendered. The court held that the assignment could be compelled, that there was a right of subrogation, that the assignment would not work a merger, and the mortgage could be interposed against the claim of dower. Of course, the technical or formal assignment is material only as showing a transfer rather than a payment, and where no payment was intended or made, but the mortgage debt subsisted in the new mortgage given, the result must be the same.

On the whole, I am satisfied that where the purchaser of the equity of redemption is not bound by pay the mortgage debt, but does in fact pay it in aid of his own title and estate, whereby it is discharged, the claim of dower is subject to a just contribution; and the case is stronger where, as here, the technical payment consists in the substitution of a new mortgage, intended to operate as and take the place of so much of the old one. The debt to which the dower was subordinat-

ed is changed in form, but in fact remains, and the discharged security may be revived when equity so requires. *Gans v. Thieme*, 93 N. Y. 225.

The judgment of the general term and of the special term should be reversed, and a new trial granted, costs to abide event. All concur.²³

IV. Foreclosure ²⁴

1. WHEN THE RIGHT ACCRUES

VAN SYCKEL v. O'HEARN.

(Court of Chancery of New Jersey, 1892. 50 N. J. Eq. 173, 24 Atl. 1024.)

Bill by Chester Van Syckel, executor, and others, against Patrick O'Hearn and others, to foreclose a mortgage. Bill dismissed.

BIRD, V. C. The complainants in this case filed their bill to foreclose a mortgage which was held by the testator, in his lifetime, on lands in the bill described. The bond which the mortgage was given to secure had been due for many years. The bill was filed on the 25th day of November, 1891. In the month of March, 1891, the then owner of the premises entered into negotiations with Patrick O'Hearn, one of the defendants, for the sale to him of the said premises. O'Hearn was willing to purchase the premises, provided the testator, who was then living, would not require the payment of the mortgage which he then held for one year from the 1st of April then next ensuing. Both parties to the said negotiations requested Mr. Wyckoff, a counselor at law, and intimately acquainted with the testator, to procure the consent of the testator that the time for payment of his mortgage should be extended for one year from the 1st of April, 1891. He did procure such consent. Thereupon the negotiations for the sale and purchase of the premises were carried through.

There being no doubt as to the amount of money actually due upon the bond which the mortgage was given to secure, the only question is whether the complainants had a right to commence their suit to foreclose said mortgage before the expiration of the one year from the 1st day of April, 1891. The complainants say that, the obligation being in writing and under seal, the time for the performance thereof cannot be enlarged by a parol agreement. I think all of the authorities, in this state, at least, hold the time for performance of every such contract may be extended by parol. *Bigelow v. Rommelt*, 24 N. J. Eq. 115; *Tompkins v. Tompkins*, 21 N. J. Eq. 338; *Maryott*

²³ As to the right of a widow to redeem, see *Burdick*, Real Prop. § 539, and cases there cited.

²⁴ For discussion of principles, see *Burdick*, Real Prop. §§ 210-212.

v. Renton, Id. 381; Stryker v. Vanderbilt, 25 N. J. Law, 482; Bell v. Romaine, 30 N. J. Eq. 28; Sharp v. Wyckoff, 39 N. J. Eq. 376; Measurall v. Pearce, (Ch.) 3 Atl. 92; King v. Morford, 1 N. J. Eq. 274; Stoutenburgh v. Tompkins, 9 N. J. Eq. 332; Baldwin v. Salter, 8 Paige (N. Y.) 473; Lattimore v. Harsen, 14 Johns. (N. Y.) 330.

Again, the complainants say that, if the time for performance of a written contract may be extended or enlarged by parol, some consideration must be shown therefor before the court will enforce such parol contract. The proposition thus stated is supported by the authorities. Parker v. Jameson, 32 N. J. Eq. 222; French v. Griffin, 18 N. J. Eq. 279, 281. But a court of equity will sometimes prevent parties from disregarding their promises, even when no consideration has accrued to them upon the making of such promise. If a party asking the aid of the court waive strict performance of his contract, and make promises to the defendant, upon which the latter has acted and altered his position, and it should appear to the court to work a hardship to the defendant to allow the complainant to withdraw his waiver, a court of equity always applies the doctrine of estoppel. In such case, although no consideration or benefit accrues to the person making the promise, he is the author or promoter of the very condition of affairs which stand in his way; and, when this plainly appears, it is most equitable that the court should say that they shall so stand. Martin v. Righter, 10 N. J. Eq. 510; Church v. Iron Works, 45 N. J. Law, 133; Bank v. Fulmer, 31 N. J. Law, 55, 86 Am. Dec. 193; King v. Morford, *supra*; Huffman v. Hummer, 18 N. J. Eq. 83, 90; Stryker v. Vanderbilt, *supra*; Miller v. Chetwood, 2 N. J. Eq. 208; Cox v. Bennet, 13 N. J. Law, 165; Lee v. Kirkpatrick, 14 N. J. Eq. 264, 267; Continental N. Bank v. National Bank, 50 N. Y. 575; Garrison v. Garrison, 29 N. J. Law, 153.

The bill should be dismissed, with costs.

2. JUDGMENT UPON FORECLOSURE

VERNER v. BETZ.

(Court of Errors and Appeals of New Jersey, 1890. 46 N. J. Eq. 256, 19 Atl. 206, 7 L. R. A. 630, 19 Am. St. Rep. 387.)

Appeal from court of chancery; Bird, Vice-Chancellor. 13 Atl. 622.

The bill of complaint sets forth that the appellee, John F. Betz, held a mortgage on a lot of land in the city of Camden, given by August Muench, one of the defendants, to secure a bond conditioned for the payment of \$1,500, with interest, dated October 10, 1885, duly recorded October 17, 1885, and that there were other subsequent

incumbrances; that when the mortgage was executed and delivered to him the premises consisted of a two-story frame dwelling-house, and the lot of land therein described, whereon the house was erected; that in February, 1887, without his knowledge or consent, Muench removed the dwelling-house to another lot, about 40 feet northward; that at the time of removal this other lot belonged to E. A. Armstrong, trustee for an association, who by deed dated July 29, 1887, conveyed the land to Muench, and Muench and wife, by deed dated August 3, 1887, conveyed to Henry Verner. He further claims that the removal of the house, the purchase and sale of the property, were fraudulent; that the security of his mortgage is thereby diminished; that it is still subject to the lien of his mortgage, and should be returned to the land described therein; that Muench has erected partly on the mortgaged lot of land a two-story frame building, used as a dancing hall and bowling alley, 24 feet in width and 58 feet in length, and the part thereof erected on the mortgaged premises is 4 feet in width and 58 feet in depth; that other persons claim building liens on the building, and the lots whereon it stands; and the title to the land on which the building is erected, adjoining the mortgaged land, is now in other parties. He also sets forth that the lot of land, without the building, is worth about \$250, and inadequate to secure and raise the amount of his mortgage; and that Muench is insolvent. He therefore prays a foreclosure and sale of the mortgaged premises, that Muench and Verner may be decreed to return the frame dwelling-house to and upon the lot of land described in his mortgage, and that they may be restrained from conveying or creating any lien on the same. The defendant Verner denies all fraud; claims to be a bona fide purchaser for full value, and without notice of complainant's mortgage, or of the removal of the dwelling-house from the mortgaged premises. Upon the proofs taken, a decree was made that, unless Verner pay the complainant's debt and costs within 20 days, a receiver be appointed to take charge of the dwelling-house, and move it back to the lot whence it was removed, and that the mortgaged premises be sold to satisfy the debt secured by the mortgage, with other incumbrances, and costs. The defendant Verner appeals from this decree.

SCUDDER, J., (after stating the facts as above.) The exact form in which this decree is made for the removal of the house back to the mortgaged premises from which it was taken is, so far as my examination of the authorities has gone, without precedent; but this may be not objectionable, if, in administering equitable relief, it be found necessary to apply a remedy which is unusual. The design of the bill is to restore to the mortgagee his security, which he alleges has been taken from him by the severance of the dwelling-house from the land covered by his mortgage, and its annexation to land owned by another. The defense is that the house was removed on another

lot, to make room for a larger building which was to be extended over on the lot of land from the adjoining premises; that the defendants acted in good faith; that the complainant had notice, and, if he did not consent, did not object; that a full money consideration was paid, without any actual notice of the lien of the mortgage on the land from which the building was removed, and that the defendant Verner, who appeals, is a bona fide purchaser of the building.

The facts are not as fully proved as they might have been, and are thus likely to mislead the court. We do not find in the evidence proof of the knowledge of the defendant Verner of the transfer of the building from one lot of land to the other, by which he may be charged with constructive notice of the lien of the mortgage, nor actual notice of a fraud that was intended, which appears to have been satisfactory to the court below. It appears that Verner lived in Philadelphia up to February 15th, when he moved to Camden, and opened a grocery store about two squares from Muench's place of business, and after that time went there frequently. He kept bar for him from May to August. Muench testifies that the house was removed about the 3d or 4th of February, and thinks they started in January. This was before Verner came to Camden. Verner says he did not know that the house had been moved from another lot until after he had bought it. This evidence, if believed, shows that he neither saw nor knew that the house was moved from the mortgaged premises, and there was not a fraudulent knowledge or collusion in the purchase. Without proof of such collusion, the testimony of two witnesses that Muench told them "he removed the dwelling-house so that, if the sheriff come on him, he would have a house anyhow," is not competent to show that Verner had knowledge of a fraudulent purpose, and participated in it. If said, it was spoken between other parties in his absence. *Faulkner v. Whitaker*, 15 N. J. Law, 438.

The payment of the consideration by Verner to Muench is testified to by them, and by Muench's wife, who says she saw money paid, without knowing the amount. The purchase price, they say, was \$1,300, paid in different sums, at several times,—\$400 on February 15th, \$300 July 30th, \$500 on August 1st, and \$100 in wages due Verner. The first money was brought from Philadelphia, obtained by selling out a grocery store there, and cash on hand. The second and third payments were, as Verner says, borrowed from his brother. The first sum was \$400, loaned to assist Muench in building. Afterwards, he says, when he asked for it, he was told that he (Muench) had no money, and he offered to sell the house and lot. He did not want it, but, with the advice and help of his brother, he bought it to save losing the money he had loaned. Although this money was all paid before August 3d, when the deed was dated, it was not a pre-existing debt, without parting with anything of value at the time of conveyance, depriving the defendant Verner of the character of a bona fide

purchaser for value, as was argued by counsel; but all, excepting the first two items, were parts of a present consideration, appropriated, when made, to its payment, and sufficient to constitute the defendant Verner a bona fide purchaser in equity. *Mingus v. Condit*, 23 N. J. Eq. 313; *De Witt v. Van Sickie*, 29 N. J. Eq. 209; *Basset v. Nosworthy*, 2 Lead. Cas. Eq. 82. The small profit derived from the grocery store conducted by his wife while he attended bar for Muench, and before that time; the fact that Muench collected rent of the tenant, after the alleged sale, as Verner's agent; and the failure to produce the brother who was said to have loaned the money to complete the purchase,—cast suspicion on the consideration; but as the proof now stands, with the positive evidence of three witnesses to sustain it, and nothing more than these circumstances to overcome it, we do not feel warranted in saying that this payment was not made. Muench swears positively that he received these sums of money, and applied them to making the improvements for the summer garden.

Assuming that the appellant, Verner, bought the house, and paid for it a valuable consideration, without knowledge of its removal, as appears by the direct proof, and that Muench sold it, as he testifies, to raise money to pay for the hall building, and the improvements he was making, the important question is presented whether the complainant is in a position to obtain the relief he asks here for the injury he has sustained. Can a court of equity return to the wasted property the building that has been wrongfully removed, and sold to a bona fide purchaser, after being affixed to other land not included in the mortgage? The subject of legal and equitable relief, where such removals are made, is considered by Mr. Jones in his book on Mortgages, (sections 143, 144, 453, 684,) with abstracts from cases and numerous citations in the notes. It is a question on which the authorities are divided, and depends for its solution on the effect given to a mortgage of lands. It seems that where the mortgage is regarded as a conveyance of the legal title to the property, giving the mortgagee the right of possession, his legal ownership, and actual or constructive possession, give him the right to follow and recover the property severed. The principle applied is that property severed from the realty, so as to become a chattel, belongs to the legal owner of the land; but where the mortgage is regarded merely as a lien for security, and the mortgagor has the right of possession until ejectment or foreclosure, there the mortgagee has merely the right to restrain the removal of the property by injunction, to protect his lien, or, after the removal, only a right to recover damages for the wrongful diminution of his security.

The case of *Hamlin v. Parsons*, 12 Minn. 108, (Gil. 59), 90 Am. Dec. 284, comes nearer to the conclusion reached by the decree in this case than any other to which my attention has been called. There the mortgagor moved a dwelling on an adjoining lot belonging to his

wife, without the knowledge of the mortgagee, but with the knowledge of the wife; and it was held that the lien on the dwelling-house remained, and the mortgagee might sell the lot of land covered by the mortgage, and afterwards the house, to satisfy his mortgage. But in *Harris v. Bannon*, 78 Ky. 568, where a petition was filed in equity to subject to the lien created by the mortgage a number of cottage buildings which had been removed to other land, and affixed, it was held that when the buildings were severed from the mortgaged premises, and had become part of another freehold, the lien upon them was gone. In *Peirce v. Goddard*, 22 Pick. 559, 33 Am. Dec. 764, the materials of a dwelling-house or mortgaged land were used in the construction of a house upon another lot of land. It was said the right of property vested in the grantee of that land, and the mortgagee could not maintain trover against the purchaser, either for the new house, or the old materials used in its construction. In *Cooper v. Davis*, 15 Conn. 556, millstones were severed from the mill, and sold by the mortgagor. It was held that the title passed to the purchaser, and there was no power to seize them after they had been severed and carried away. In *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90, where a house subject to a mortgage was floated off by a flood into the street, and was bought while in that position, it was said that the severance affected the right of lien; that a building on land was subject to the lien of the mortgage whether there at the time of the mortgage, or built there afterwards, but, when severed, the lien was lost. If the contrary were the law, everything affixed to mortgaged lands might, when severed and sold to a bona fide purchaser, be followed and reclaimed. *Clark v. Reyburn*, 1 Kan. 281; *Kimball v. Darling*, 32 Wis. 684; *Van Pelt v. McGraw*, 4 N. Y. 110; *Gardner v. Heartt*, 3 Denio (N. Y.) 232; *Lane v. Hitchcock*, 14 Johns. (N. Y.) 213; *Hutchins v. King*, 1 Wall. 53, 17 L. Ed. 544; *Gore v. Jenness*, 19 Me. 53; *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563; *Byrom v. Chapin*, 113 Mass. 308; *Wilson v. Maltby*, 59 N. Y. 126; and many other cases,—might be cited as illustrating the differences of opinion, and the principles applied, in determining the rights of parties when fixtures are severed and sold from mortgaged lands. A distinction is made in *Hoskin v. Woodward*, 45 Pa. 42, where it is said that a mortgagor may sell, in the usual way, lumber, fire-wood, coal, ore, or grain growing on the land, until the mortgagee stops him by ejectment or estoppel; for these things are usually intended for consumption and sale and the sale of them is the usual way of raising the money to pay the mortgage. But in the case of a factory or other building it is from the use of it as it is, and not by its consumption or its sale by piecemeal, that all its profits are to be derived.

It is manifest that this cannot be reconciled with cases cited above, as furnishing a rule applicable to all fixtures, but that any general rule must be based on the right of property. If the mortgagee have

the legal ownership and right of possession, he may follow things severed and removed from the mortgaged lands without his consent wherever he can find them. If he holds title under the mortgage only as security for his lien, then the remedies appointed for preserving the security, and compensating for any loss sustained by its diminution, are such, only, as the mortgagee may use. The theory in the latter case is that, as to innocent third parties, the mortgagor is the owner of the property, and may sever and sell until restrained by injunction, or ejected by entry, or barred by foreclosure. In any view taken of the respective rights of mortgagor and mortgagee, the latter may have the security of his lien protected by injunction. *Brady v. Waldron*, 2 Johns. Ch. (N. Y.) 148; *Emmons v. Hinderer*, 24 N. J. Eq. 39.

In our state the title of the mortgagee to lands under his mortgage has been defined by this court in *Shields v. Lozear*, 34 N. J. Law, 496-503, 3 Am. St. Rep. 256, where it is said that the mortgage is regarded, not as a common-law conveyance on condition, but as a security for debt; the legal estate being considered as subsisting only for that purpose. This is elsewhere called the equitable and the American doctrine, by which the mortgagor has a right to lease, sell, and in every respect deal with the mortgaged premises as owner so long as he is permitted to remain in possession, and so long as it is understood and held that any person taking under him takes subject to all the rights of the mortgagee. 4 Kent, Comm. 157. There is no difficulty in applying this rule while fixtures remain attached to the realty; and so long as the mortgagor continues in possession, or when the property severed passes into the possession of a person in collusion with him to defeat the lien and security of the mortgagee, whether upon or off the mortgaged premises, it would seem that the rights of the mortgagee would be unaffected. But when the property is severed, and sold to an innocent purchaser, the lien in equity is gone, and the remedy of the mortgagee is an action at law against the mortgagor, and those who act with him to impair or defeat the security of the mortgage. The case of *Kircher v. Schalk*, 39 N. J. Law, 335, holds that a mortgagee of real estate, whose debt is due, but who has not entered into possession, cannot maintain replevin for a steam-engine affixed to the realty subject to the mortgage, which the mortgagor or his assigns had severed from the realty, and removed from the premises, because the mortgagee cannot, with propriety, insist upon being legally entitled to a remedy, the enforcement of which pertains to the general legal ownership of the land. But in *Turrell v. Jackson*, 39 N. J. Law, 329, it was decided that a mortgagee may maintain an action on the case against the mortgagor or his assigns for an injury to the security resulting from the removal of fixtures, or other waste, by the defendant. Notice, without fraud, was said to be sufficient to charge the purchaser with liability.

It is not necessary in this case to determine whether a court of law will enforce this remedy against a bona fide purchaser without actual notice, or the exact form of remedy that may be then used; but in a court of equity the right of such purchaser is equal to the equity of a mortgagee who has not such title to the article severed that he can maintain an action for the recovery, in specie, of the fixtures removed. It is a maxim that where there is equal equity the law must prevail. It is upon this account that a court of equity constantly refuses to interfere, either for relief or discovery, against a bona fide purchaser of the legal estate for a valuable consideration, without notice of the adverse title, if he chooses to avail himself of the defense at the proper time, and in the proper mode. 1 Story, Eq. Jur. § 64c. The conclusion given in 2 Pom. Eq. Jur. § 743, on this matter is that, wherever one or the other of the parties has a legal estate over which a court of law can exercise jurisdiction, then, in an equity suit between them, as a general rule the defense of a bona fide purchaser for valuable consideration will avail as against the plaintiff, whether he has a legal or an equitable estate. In either case the court of equity simply withholds its hand, and remits the party to a court of law. In the review of cases, which appear to conflict with the conclusion in this case, cited from the English courts, it must be borne in mind that there the mortgagee has the legal title to the mortgaged land, and the right of possession.

Having found that the appellant, Verner, is a bona fide purchaser of the building in controversy affixed to his land, according to the weight of the evidence as presented, the decree will be reversed, and modified so that the land described in the mortgage, with the building and improvements thereon, as they exist at the time of filing the bill, shall be sold to satisfy the mortgage; and, as to the injury sustained by the removal of the building formerly on the land, the mortgagor will be remitted to his remedy at law. Decree reversed unanimously.

3. FORECLOSURE UNDER POWER OF SALE

See *Fiske v. Mayhew*, ante, p. 433.

LIENS OTHER THAN MORTGAGES

I. Mechanics' Liens¹

STELTZ v. ARMORY CO.

(Supreme Court of Idaho, 1908. 15 Idaho, 551, 99 Pac. 98, 20
L. R. A. [N. S.] 872.)

Appeal from district court, Latah county; Edgar C. Steele, Judge.

Mechanic's lien foreclosure by George Steltz against the Armory Company, Limited. Judgment for plaintiff and allowing a set-off in favor of defendant, and both parties appeal. Affirmed.

AILSHIE, C. J. This action was instituted by the plaintiff for the foreclosure of a mechanic's lien. Plaintiff entered into a contract with the defendant corporation to furnish the material and construct an armory building in the city of Genesee. Plans and specifications were adopted, the price and terms of payment were agreed upon, and the building was erected. The company went into possession of the building and continued to use it for some six weeks, at which time an unusual windstorm occurred and blew down the front of the building. The company declined to pay the contractor, whereupon he filed his lien and prosecuted this action to foreclose the same. The defendant company answered, admitting the contract, but denying that the building was ever completed "in a good, substantial, and workmanlike manner." It also alleged that as an affirmative defense the building was defectively constructed, in that the front wall was not properly tied to the adjoining building, and other defects were charged, whereby the defendant alleged damages in the sum of \$200. The trial resulted in a judgment in favor of the plaintiff for a balance due of \$700 on the contract and \$28.50 for extras. The court found in favor of the defendant on its allegation of damages in the sum of \$140, which sum was offset against the total balance due on the contract. Both parties appealed from the judgment, and, since each party is both appellant and respondent in this court, we shall refer to them in this opinion as plaintiff and defendant.

Findings 4, 5, 6, and 7 are as follows: "(4) The court finds that the defendant tendered into court the sum of \$610, and is shown to have tendered the same amount to the plaintiff at a period long prior to the time of the case. (5) The court also finds that the defendant corporation has been in possession of the building ever since the date shortly after its construction, and that they went into possession of the said building with full knowledge of the defect alleged to have

¹ For discussion of principles, see Burdick, Real Prop. § 213.

been the cause of the falling of the wall. (6) The court finds that the north wall of the building was defectively constructed, and that it was not properly tied to the building, and that on an occasion, shortly after the defendant had taken possession of the same, the wall was blown down by a high wind, and the court finds that all of the afore-said facts are substantiated by the evidence. (7) The court further finds that it would take the sum of \$140 to replace the said wall, and that the defendant has been damaged to that extent, and the court finds that the defendant is entitled to deduct from the amount of the contract the sum of \$140."

Defendant contends that the fifth finding, to the effect that the company went into possession of the building with full knowledge of the defect alleged to have been the cause of the falling of the wall, is unsupported by the evidence, while the plaintiff contends that findings 6 and 7, to the effect that the north wall of the building was defectively constructed to the defendant's damage in the sum of \$140, is not supported by the evidence. We may dispose of these contentions on the part of both plaintiff and defendant by saying that there is a substantial conflict in the evidence on all these points, and that there is sufficient evidence in the record to support each of the findings. We would not disturb them on that ground. The contract provided that the plaintiff should construct this building "in a good, substantial, and workmanlike manner." Evidence was produced tending to show that the defendant complied with this provision of the contract. There was also a great deal of evidence produced by defendant to the effect that he had not complied with this part of the contract. There is also evidence both ways on the question as to whether defendant had knowledge in a general way of this defect at the time it entered into possession of the building. It must be admitted, we think, that the defect in not tying the wall to the adjoining building with spikes or ties was not an obvious or patent defect, but was rather a latent defect. Had it been a patent and obvious defect or a failure to complete the building, the defendant would, under ordinary circumstances, be held to have waived the same by taking possession of the building without doing so conditionally or protesting against its condition or demanding its completion. It may often happen that a building or structure contains a latent defect that the owner cannot reasonably discover at the time he takes possession. For instance, the material of which it is constructed may be of an inferior quality, or the work may have been so imperfectly done as to render the building or structure of little use or slight value, or so that it may fall, and thereby cause great damage to the owner. In such case the owner, although having paid for the building, would be entitled to recover damages for breach of the contract. *Barker v. Nichols*, 3 Colo. App. 25, 31 Pac. 1024.

Counsel for the defendant contends that these defects actually ex-

isted as proven and found by the court, and that for such reason the plaintiff had failed to "faithfully perform and fully comply with the contract on his part," and was consequently not entitled to recover, and particularly not entitled to a lien, under section 7 of the Lien Laws (Sess. Laws 1899, p. 148). In support of this contention, plaintiff cites the cases of *Justus v. Myers*, 68 Minn. 481, 71 N. W. 667, and *Boots v. Steinberg*, 100 Mich. 134, 58 N. W. 657, and 27 Cyc. 402, 403. The *Justus* Case involved a contract for putting in a heating plant. The contract contained a warranty to the effect that the radiation should be sufficient to heat the rooms to 75 degrees on the coldest winter weather, and that the plant might be tested by the owner before accepting, and that, if not entirely satisfactory, it should be made so by the contractor without any additional expenses. The defendant alleged that she had never accepted, but, on the contrary, had notified the plaintiff that it was not up to the requirements, and that she would not accept it. The court held that there was no substantial compliance with the contract, and that they could not maintain their action. In *Boots v. Steinberg*, the contract provided for the erection of a house, and, among other stipulations, provided that it should be to the satisfaction of the owner, who should have the right to act as superintendent of the work, or appoint some one to act in that capacity, and the last payment was not due until "10 days from the completion of said work to the satisfaction of said Julius Steinberg." It appeared from the evidence that a number of things required to be done by the contract were never in fact completed in any manner, and others were imperfectly completed. The court held that the contract was not substantially complied with and refused plaintiff any relief. The facts of that case are somewhat different from the facts of the present case. Here, so far as outside appearances were concerned, and as a matter of fact, the building was a completed structure, although defectively constructed. The company accepted it, and one of the defendant's officers went far enough on the night it was opened for use to publicly state that they had a better building than they had expected to get for the money, and that they thanked the contractor for the work he had done. The trouble was, however, that, in the matter of construction itself, the building, although a completed structure, was so defectively and imperfectly erected as to entail damage to the defendant by reason of the front blowing out when the storm came.

Taking possession of the building with knowledge of the latent defect it contained is sufficient to prevent the owner from denying the completion of the building in an action by the contractor to foreclose his lien. Section 6, Lien Laws (Sess. Laws 1899, p. 148); *Boisot on Mechanics' Liens*, § 1; *Bell v. Teague*, 85 Ala. 211, 3 South. 861. On the other hand, the mere fact of entering into possession with knowledge of this defect is not sufficient to defeat the owner's right

of action for breach of the contract as to the quality of material used, of the class and character of workmanship put on the building, unless an express waiver is shown, or such other facts as would amount to a waiver. The owner always has the general possession of the property, and the contractor's possession is only a special and limited possession for the purpose of doing the work for which he has contracted. It often becomes necessary and essential for the owner to take possession of a building or structure, although not completed or imperfectly and defectively constructed, in order to protect himself from still further and greater damages. The fact of such possession should not be a bar to his right of recovery for breach of the contract. *Barker v. Nichols*, 3 Colo. App. 25, 31 Pac. 1024; *Hanley v. Walker*, 79 Mich. 607, 45 N. W. 57, 8 L. R. A. 207; *Boots v. Steinberg*, 100 Mich. 134, 58 N. W. 657; *United States v. Walsh*, 115 Fed. 697, 52 C. C. A. 419. Knowledge in a general way of a latent defect of which the owner had no means of knowing its extent and latent dangers will not amount to a waiver of the right of action for a breach of the contract, in the absence of other facts tending to disclose an intent to waive the right of action.

Under section 6 of the Lien Laws (Sess. Laws 1899, p. 148), every original contractor claiming the benefit thereof must within 90 days, and every other person within 60 days, after the completion of a building, improvement, or structure, or in case he, for any cause, ceases to labor thereon before the completion thereof, file for record with the county recorder his notice of lien, etc. Section 1 of the act provides that every person performing labor or furnishing material for a building or structure is entitled to a lien. This statute seems to be drawn upon the theory that any person who contributes labor or material for the construction, alteration, or repair of a building or structure on another's real estate is entitled to a lien therefor. Of course, the extent of the lien when he comes to foreclose it must be measured by the amount found due him on his contract at the time of filing his lien. If there is nothing due him under his contract, he is not entitled to any lien; but, if anything is found to be due him, he is entitled to a lien therefor. This statute is evidently based on the theory that whoever contributes labor or material whereby the real property of another is enhanced in value shall be entitled to a lien upon the whole property in the sum due. The affirmative answer and defense of defendant in this case is drawn apparently on the theory that the building, although at one time a completed structure and accepted by the defendant, contained latent defects and faults which resulted in damage to the defendant, and that defendant was entitled to recover the amount of damage sustained by reason thereof and have the same set off against the contract price of the building. The court's findings and judgment seem to follow that

theory of the case. We think it was proper, and in harmony with the law, for the court to find the amount of damage sustained by defendant on account of the defective workmanship and construction, and to offset the same against the balance due on the contract price.

Appellant also insists that the court erred in not awarding it damages at the rate of \$5 per day for each day it was kept out of possession of the building, from the 1st day of September until the date it entered into possession. The contract contained a provision that the building should be completed on the 1st day of September, and that the contractor should pay the owner the sum of \$5 per day for each day thereafter until the building should be completed. The court made no finding on this question. In fact, there was no issue tendered on that subject. The defendant did not plead damages on account of plaintiff's failure to complete the building within the time specified in the contract. There is no mention of this either in the answer or affirmative defense. It would be manifestly erroneous to allow a party to recover such an item of damages for breach of a contract without tendering any issue whatever on the subject. *Stevens v. Home Sav. & Loan Ass'n*, 5 Idaho, 741, 51 Pac. 779, 986; *Murphy v. Russell & Co.*, 8 Idaho, 151, 67 Pac. 427.

We find no error in the record and the judgment will therefore be affirmed. Each party having appealed in this case, the whole cost of the two appeals will be equally divided between the parties to the action.

SULLIVAN and STEWART, JJ., concur.

KERTSCHER & CO. v. GREEN.

(Court of Appeals of New York, 1912. 205 N. Y. 522, 99
N. E. 146, Ann. Cas. 1913E, 561.)

Appeal from Supreme Court, Appellate Division, First Department.

Action by Kertscher & Co. against Samuel Green and others and Robert S. Minturn and others. From a judgment of the Appellate Division (143 App. Div. 907, 127 N. Y. Supp. 1127), which affirmed a judgment for plaintiff (67 Misc. Rep. 293, 124 N. Y. Supp. 461), the first-named defendants appeal. Affirmed.

CULLEN, C. J. The action was brought to foreclose a mechanic's lien to discharge which a bond had been given in compliance with the terms of the statute. The Special Term of the Supreme Court rendered judgment for the plaintiff, and that judgment has been unanimously affirmed by the Appellate Division.

But one objection to the recovery is raised on this appeal. The plaintiff contracted to perform the carpenter's and cabinet work and furnish materials in the building to be erected for the defendant. By the written contract it was provided: "That the party of the second

part will not at any time suffer or permit any lien, attachment, or other incumbrance under any laws of this state or otherwise, by any person or persons whomsoever, to be put or remain on the building or premises, into or upon which any work is done or materials are furnished under this contract, for such work or materials, or by reason of any other claim or demand against the party of the second part, and that they will not put any materials on said building to which it has not obtained absolute title; and that any such lien, attachment or other incumbrance, or claim of a third party until it is removed, shall preclude any and all claim or demand for any payment whatever under or by virtue of this contract, and in the event that same is not removed, party of the first part may remove same at the expense, including legal fees, of the party of the second part." Payments were to be made on or before the 10th day of each month of 80 per cent. of the value of the work done in the preceding month. It was further provided that the final payment should not be made until there was filed with the superintendent or architect a certificate of the county clerk that no mechanic's lien had been filed against the owner for work or materials furnished under the contract and the certificate of the register that no conditional bill of sale had been filed by a third party for any material furnished on said property. After the completion of the work on October 26, 1907, the plaintiff filed a mechanic's lien for the amount due him under the contract, to foreclose which this action was brought.

The contention of the appellants is that the lien was invalid because by the contract the plaintiff, the contractor, had agreed not to file any lien. To this contention there are two answers. The trial court found that the defendants had failed to make the payment for the September work which became due under the contract on October 10th. Assuming that the contract between the parties is to be construed as contended by the plaintiff, the breach of the contract by the defendants by their default in making that payment relieved the plaintiff from the obligation upon its part, and it became entitled to file a lien for its work and materials. This proposition has recently been held by this court in the case of *Greenfield v. Brody*, 204 N. Y. 659, 97 N. E. 1105, decided without opinion. In that case the contract was for the construction of several houses, and the contractors were to be paid in part by the conveyance to them of two of the houses. The owner transferred the property, thus putting it beyond his power to comply with the contract. It was held this authorized a contractor to file and maintain a lien. In that case the plaintiffs, contractors, had expressly agreed that under no circumstances would they file or cause to be filed any mechanic's lien against the property.

There is this further answer to the appellants' position. As we construe the provisions of the contract, the paragraph quoted referred only to liens filed against the contractor by workmen, subcontractors, or materialmen. This is apparent not only by the language "or

by reason of any other claim or demand against the party of the second part," the word "other" showing that the claims antecedently mentioned were to be of the same character—that is to say, against the contractor—but by the further provision that the owner might remove any lien at the expense of the contractor, including legal fees, a provision quite inapplicable to a lien filed by the contractor itself. Moreover, to preclude a contractor by virtue of some provision to that effect in the contract, from his right to the security which the statute affords him, the intent and interpretation of the provision should be reasonably clear.

There are many reasons why an owner might wish to be free from the claims of subcontractors and materialmen against the principal contractor which might involve him in expensive litigation and the possibility of loss should a payment to the principal contractor be deemed to have been improperly made as against the lienors. Those reasons are without force to a lien filed by the principal contractor. True, there might be disputes between the contractor and the owner as to the amount due him, and these might involve the owner in litigation, but he would be subject to the same risks and expenses of litigation in a suit at law on the contract as in an action to foreclose the lien. That a provision in a contract, quite similar in principle to the one before us, applied only to the liens of third parties against the contractor, was held by the Supreme Court in *Lauer v. Dunn*, 52 Hun, 191, 5 N. Y. Supp. 161, which decision was affirmed in this court, though this proposition was not discussed in our opinion (115 N. Y. 405, 22 N. E. 270).

The judgment appealed from should be affirmed, with costs.

GRAY, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. VANN, J., absent.

Judgment affirmed.

II. Judgment Liens ²

BOURN v. ROBINSON.

(Court of Civil Appeals of Texas, 1908. 49 Tex. Civ. App. 157, 107 S. W. 873.)

Appeal from District Court, Howard County; R. G. Smith, Judge.

Action by F. M. Bourn against John Robinson to foreclose a judgment lien. Judgment for defendant, and plaintiff appeals. Affirmed.

HODGES, J. On the 1st day of April, 1901, the appellant recovered a judgment in the Circuit Court of the United States for the Northern District of Texas, at Abilene, against one Frank Tomlinson for the sum of \$2,629.23 and all costs of suit. Subsequently, on the 30th day of April, 1903, this judgment was abstracted and filed for record

² For discussion of principles, see *Burdick*, Real Prop. § 214.

in the office of the county clerk of Howard county. It was properly recorded and indexed as required by law for fixing judgment liens. At the time the judgment was filed for record in the office of the county clerk of Howard county, Dawson county was unorganized, and was attached to Howard county for judicial purposes; but subsequently, on the 20th day of March, 1906, and prior to the institution of this suit, it was duly organized in conformity with the requirements of law. On the 9th day of January, 1903, Tomlinson, the defendant in the above-described judgment, filed his application to purchase from the state four sections of school land situated in Dawson county, a part of which is the land involved in this suit. On the 21st day of January thereafter his application was approved, and the land awarded to him by the Commissioner of the General Land Office. Tomlinson resided upon that part of the land so purchased, designated as the "home section," in compliance with the requirements of law, till on or about the 24th day of November, 1905. Up to that time he had paid all of the installments, both of the principal and interest, as they became due. On that date, and before his period of three years' occupancy required by the laws of the state had expired, Tomlinson sold all of the interest he had in the entire four sections of land to the appellee, John Robinson, receiving therefor the consideration of \$5,500, \$2,000 of which were paid in cash. After his purchase from Tomlinson, appellee continued to reside upon and occupy the home section, in compliance with the provisions of law, until the period of three years' occupancy was completed; and on the 18th day of January, 1906, he proved up his occupancy, and received a certificate to that effect from the Land Office, and the four sections now stand on the records of that office in his name. The judgment against Tomlinson in favor of the appellant not having been satisfied, the appellant, on the 9th day of March, 1907, instituted this suit in the district court of Howard county, seeking to foreclose his judgment lien on a part of the land which appellee had purchased from Tomlinson. The cause was tried before the court without a jury, resulting in a judgment in favor of the appellee; from which the appellant has appealed.

Appellant relied in the court below upon the validity of his judgment lien at the time of the institution of this suit, and the further fact that the land purchased from Tomlinson by the appellee was subject to the lien created by the record of his abstract. The appellee contends that the appellant failed to prove that execution had been issued upon his judgment within a year after its rendition; and, further, that Tomlinson did not, at the time of his sale to Robinson, own such an estate or interest in the lands as was subject to a judgment lien.

It is provided by the acts of Congress that judgments and decrees rendered in a Circuit or District Court of the United States within any state shall be liens on property throughout such state in the same manner and to the same extent, and under the same conditions only, as if such judgments and decrees had been rendered by a court of general

jurisdiction in such state. 4 Fed. Stat. Ann. p. 4. Our statute provides that, when the abstracts of judgments rendered in any of the United States courts shall be recorded and indexed in the same manner required by law for recording and indexing abstracts of judgments rendered in state courts, they shall operate as liens in the same manner as is provided for judgments of state courts. Sayles' Rev. Civ. St. 1897, art. 3293. Article 3290 of our statute also provides that, when a judgment lien has been acquired under the laws governing the recording of abstracts of judgments, it shall continue for 10 years from the date of such record and index, unless the plaintiff shall fail to have execution issued upon his judgment within 12 months after the rendition thereof; in which case the said lien shall cease to exist. It has been decided by our Supreme Court that in order to establish the existence of a lien the burden is upon the plaintiff to prove that an execution has been issued upon his judgment within 12 months after its rendition. *Boyd v. Ghent*, 95 Tex. 46, 64 S. W. 929; *Schneider v. Dorsey*, 96 Tex. 544, 74 S. W. 527.

The only testimony offered by the appellant tending to show that an execution had been issued upon his judgment within 12 months consisted of the entries on the execution docket of the clerk of the Circuit Court of the United States in which the judgment was rendered. These entries consisted of dates entered under an orderly arranged system of ruled lines, showing date of issuance of execution to be November 16, 1901, returnable to February term, 1902. There was no other evidence of what disposition was made of the writ after it had been prepared by the clerk—nothing to show whether or not it had been delivered to the plaintiff or his attorney, or to the marshal of the district. Upon this testimony alone the appellant depends to establish the fact that he had complied with the law requiring executions to be issued within 12 months from the rendition of a judgment in order to prevent its becoming dormant. The trial court held that it was insufficient to establish that fact, and we are asked to reverse that finding. If the mere clerical writing out and attestation of the writ is all that is required to "issue" an execution, then the appellant has proven the desired fact; but such is not the law regarding the use of that term in the statute relating to the duty imposed upon the holders of judgments. The term "issue" means more than the mere clerical preparation and attestation of the writ, and requires that it should be delivered to an officer for enforcement. *Schneider v. Dorsey*, *supra*; 1 *Freeman on Execution*, § 9a; 17 *Ency. of Law and Procedure*, 1033. The law requires that, when an execution has been placed in the hands of a sheriff, he shall note upon it the hour and the day received, and shall, within the time prescribed by the execution, make due return of what he has done, in compliance with the requirements of the writ.

We cannot, in the face of the record, indulge the presumption that the clerk, upon the preparation and attestation of the writ, delivered it to the proper officer. The law does not require him to do that, and

hence we cannot assume, from the mere entries upon his record, that he has done more than what was required of him. For aught that appears to the contrary, he may have delivered the writ into the hands of the plaintiff or his attorney or it may have been left among the papers, and lost or misplaced without ever reaching the marshal. If we are required to presume one fact from the existence of another, the presumption would naturally be against such a thing having been done; for, if he had delivered it to the proper officer, it will be presumed in the absence of evidence to the contrary, that the officer to whom it was delivered would have done his duty and made some return upon the writ showing what official action he had taken thereunder. In the case of *Schneider v. Dorsey*, *supra*, it was distinctly decided that in order to be a compliance with the statute the writ must be placed in the hands of the officer whose duty it is to execute it; and, until this is done, there has been no sufficient compliance with the law requiring executions to be issued within a year from the rendition of the judgment in order to preserve its validity. The issue as to whether or not an execution had been issued, as required by law, being one of fact, and having been decided adversely to the appellant in the court below, we do not think the evidence contained in the statement of facts would justify us in setting that finding aside.

But if we should be in error in disposing of the case in the manner we have upon that issue, there is still another cogent reason why the judgment of the court below should be affirmed. The facts show that the only claim to the land in controversy ever asserted by Tomlinson was that of a purchaser as an actual settler, from the state, the land being a part of the public school fund, and that he parted with that claim to the appellee, Robinson, before he had completed the three-years occupancy required by law. From these facts it seems that Tomlinson never owned such an interest in the land as would be the subject of a judgment lien. That property of a defendant which is subject to a judgment duly abstracted, recorded, and indexed, in the manner required to fix a judgment lien under our law, is described as being "all of the real estate of the defendant." The terms "real estate," as used in this article, mean something more than a mere chattel interest in land—more than a simple contract right to perform conditions, aside from the payment of the purchase price—and demand a conveyance of the title. They import a freehold interest, either an estate for life, or in fee simple. *Scogin v. Perry*, 32 Tex. 21; *Harrington v. Sharp*, 1 G. Greene (Iowa) 131, 48 Am. Dec. 365. The last case cited above was decided by the Supreme Court of Iowa in the construction of language almost exactly the same as that used in our statute. The court said: "By the language 'real estate of the person,' we understand that the fee simple, or estate of inheritance, must be in the person in order to have the judgment against him operate as a lien upon the land. A mere pre-emption right confers no such fee or estate upon the person. It is but a temporary and conditional in-

terest unknown to the common law. It only imparts to the pre-emptor a right over others to purchase the land within a limited period, at a stipulated price, and if he fails to pay the price within the time required the right ceases. It is of a nature no greater than an estate for years—a mere equitable and contingent interest.”

We think the reasoning quoted is applicable to the facts here involved—perhaps with stronger force. In that case the only contingency mentioned was the payment of the purchase price; while in the case at bar there is the other condition of occupancy involved. The rights of a purchaser of school land prior to the completion of the three-years occupancy are no better than those of a pre-emptor. He holds possession under a contract which contemplates title only upon the performance by him of certain conditions independent of the payment of the purchase money. *Besson v. Richards*, 24 Tex. Civ. App. 64, 58 S. W. 612. The right thus held is not subject to seizure and sale under any judicial proceedings. *Williams v. Finley*, 99 Tex. 468, 90 S. W. 1088; *Martin v. Bryson*, 31 Tex. Civ. App. 98, 71 S. W. 615; *Gaston v. Mar. Imp. Co.*, 139 Ala. 465, 36 South. 738. In the case of *Williams v. Finley* the Supreme Court said: “The state sells the land partly because of the qualification and status of the purchaser as an actual settler. Because of this, it asserts its right to sell, and his to buy, under such arrangements as that stated. To carry out the policy of the law the state has the right to insist upon the maintenance of its contract and of the relation created by it. A judgment such as that rendered below would tend to the destruction of both. By selling out the settler’s title at judicial sale, and putting the purchaser thereat in possession, it would destroy the occupancy of the settler—the condition on the maintenance of which the title depends—and could not at the same time require the purchaser at the judicial sale to perform it. If it be said that only by performance could he obtain the benefit of the purchase from the state, the answer is twofold: (1) There is no provision for the substitution of such a purchaser for the original one; and (2) performance would at best be optional with him, and the rights intended to be secured by the law to the state would be dependent on his will. Many persons who might bid at such sales would be wholly disqualified under the law to hold these lands as purchasers.” The absence of the right of foreclosure of a noncontract lien by a judicial sale is striking evidence of the entire absence of lien which must depend upon such foreclosure for its enforcement. The law does not give a lien which cannot be enforced at any time after the obligation becomes due, subject to such other rights as may be superior thereto. The refusal to permit a judicial foreclosure and sale of the land in such cases as the one now under consideration is based upon the personal conditions imposed by law, and the relations established between the parties by the terms of the contract. The policy of the state in the disposition of its school lands is to sell to those only who will actually settle upon and occupy them as homes.

In the case before us it is not claimed that Tomlinson acquired from the state the legal title to the land, but that he was vested, by virtue of his contract of purchase with an equity that became subject to the judgment lien while he was in possession of the lands. In order for this equity to attain the dignity of "real estate," as used in the statute, it must amount to a freehold interest. A freehold is an estate for life, or in fee simple. 1 Washburn, Real Prop. 41, 42. That no mere life estate was contemplated in the contract with the state is made evident from the legal requirements as to the conveyance that shall be made upon the ultimate compliance by the purchaser with the conditions of the sale. The law provides for a fee-simple conveyance in such an event; hence, it follows that whatever fee, if any, became vested in Tomlinson by virtue of his contract of purchase from the state was a fee simple, subject only to the prior right of the state to enforce the conditions imposed by the terms of the contract. One of the essential qualities of a fee-simple estate is that it is one of inheritance—one which passes, upon the death of the ancestor, to all the heirs generally, and not to a particular heir or set of heirs. 11 Am. & Eng. Ency. Law, 366; 16 Cyc. 602; Black's Law Dict. 520.

Had Tomlinson died while in possession of the land, and before he had completed the three years of occupancy, the interest which he at that time owned would not have passed to his heirs generally, but would have been forfeited to the state, unless some particular heirs, not disqualified under the law, should enter into a new obligation with the state to carry out the terms of the purchase and continue to reside on the land. In order to avail themselves of the occupancy and payments made by Tomlinson such heirs must make the affidavit required by law, and enter into the obligation to pay the remainder of the purchase price; and by virtue of this contract and the terms of the statute, and not by right of inheritance from Tomlinson, is the right acquired to obtain a patent to the land. Again it is only by virtue of the permission of the statute that the purchaser of school lands may assign his interest to another. A freehold estate is assignable by virtue of the rights acquired under the conveyance resulting from the nature of the estate, and does not rest upon permission from the grantor given independently. After the completion of the three years of occupancy the rights of the purchaser of school land become much enlarged by his having complied with the conditions of the sale, other than the payment of the price, imposed by law. He, or his vendee, can then pay the entire balance due the state, and secure a fee-simple title to the land. Until then, he has nothing more than a chattel interest, and, consequently, not such an estate as becomes subject to a judgment lien.

Appellant cites us to the case of *Harwell v. Harbison*, 43 Tex. Civ. App. 343, 95 S. W. 30, decided by the Court of Civil Appeals of the Second District. It was there held that there was no reason in law

why a purchaser of school lands should not be permitted to mortgage the lands before, as well as after, he had completed the three years of occupancy. It is said that if the mortgagee is willing to wait till the requisite occupancy is completed, before foreclosing his mortgage, and to take the chances of the mortgagor complying with the conditions of the sale no one else ought to complain. Admitting the correctness of that ruling as applied to the facts of the case then before the court, it is far from being a precedent for the determination of this. Parties may enter into such contracts as they may see fit, when not in violation of some established rules of law, and may create such rights or liens as they see proper, which may depend for their enforcement upon conditions other than the maturity and nonpayment of the debt sought to be secured. As a general rule, any species of property which may be sold or conveyed may also, in the absence of some legal inhibition, be mortgaged, or conveyed in trust, to secure a debt. Many interests in *præsent*i, or in expectancy, may be the subject of conveyances which could not be seized under any legal process, or subjected to a judicial sale. A crop may be mortgaged before it is planted, but it is not then subject to be seized under execution, nor would the lien then created, if done in good faith to secure a contemporaneous debt, be considered in fraud of prior existing creditors of the mortgagor. The right of foreclosure in such cases would be postponed till such times as the crops assumed the form of tangible personal property.

The grounds upon which a mortgage will be sustained when given upon property not then in existence, or property in existence not then owned, but afterward acquired, by the mortgagor, are upon the principles of equity and estoppel. 1 Jones on Mort. §§ 151, 152. If there is a potential right existing in one to acquire certain articles or species of property, a valid mortgage may be given in advance of the acquisition. *Richardson v. Washington*, 88 Tex. 344, 31 S. W. 614. One who buys the right of the mortgagor with actual knowledge of the lien given by him is estopped, equally with the original mortgagor, to assert that the lien is not binding upon the property, although the property upon which the lien is given was not in existence at the time the mortgage was executed. A prospective heir may sell or mortgage his expectancy in the estate of his ancestor during the latter's lifetime. *Hale v. Hollon*, 90 Tex. 427, 39 S. W. 287, 36 L. R. A. 75, 59 Am. St. Rep. 819; *Bryan v. Sturgis Nat. Bank*, 40 Tex. Civ. App. 307, 90 S. W. 705. But this expectancy, even though it be based upon the real estate of the ancestor, could not be subjected to a judgment lien against the heir till the title actually vested. If the heir should sell the expectancy before descent cast, the holder of a judgment lien could not then subject the property in the hands of the purchaser to the satisfaction of his debt. *Hale v. Hollon*, *supra*. In the case of *Harwell v. Harbison*, *supra*, the vendee of the purchaser took the land with the knowledge that a mortgage had been given by his

vendor. There was at the time of the creation of the mortgage a potential right in the mortgagor to acquire the property by complying with the terms of his purchase. By reason of that fact he could create a valid lien upon it to be subject to foreclosure when his title became perfect. His vendee, having actual knowledge of the existence of this lien, was in no attitude to deny its validity, or its superiority over his title.

By disposing of the lands involved in this suit, before he acquired a freehold interest, Tomlinson effectually prevented the lien of the appellant from attaching. If it did not attach in his hands, it could not afterward do so while in the hands of a stranger to the judgment. When the appellee purchased from Tomlinson, he took the lands unincumbered by the lien.

There being no error, the judgment of the district court is affirmed.

VAUGHN v. SCHMALSLE.

(Supreme Court of Montana, 1890. 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411.)

Appeal from district court, Custer county; George R. Milburn, Judge.

HARWOOD, J.* In this appeal two questions of law are to be determined: First. A question of priority and relative legal effect of a judgment lien on real estate, and title acquired at execution sale thereunder, as against a mortgage executed and delivered prior to docketing of the judgment, but not recorded until after the judgment was docketed, and levy made under execution. Second. A question as to the sufficiency of description of a portion of the real estate mentioned in the mortgage. These questions will be considered in the order stated.

This appeal is from the judgment of the trial court, and we find in the judgment roll an exception to the conclusions of law found by the court, on the ground that the same are not supported by the facts, as found by the court. The facts bearing upon the first point of controversy, as found by the court, are as follows: March 1, 1886, plaintiff loaned to J. F. Schmalsle \$700, payable 12 months after date, with interest at the rate of 24 per cent., per annum, for which said J. F. Schmalsle made and delivered to plaintiff a promissory note and a mortgage, to secure the same, principal and interest, and \$25 attorney's fees, on certain described lots of land situate in Miles City, county of Custer, which mortgage was filed for record in the office of the county clerk and recorder of said county, April 5, 1886. On the 11th day of March, 1886, judgment was rendered and docketed against said mortgagor, in the district court in and for said county,

* Part of the opinion is omitted.

for the recovery of the sum of \$1,500 in favor of William F. Schmalsle, one of the defendants in this action; that execution was duly issued on said judgment on March 19, 1886, under which execution the sheriff levied on the same real estate mentioned in said mortgage, and thereafter, on the 9th day of April, 1886, sold said real estate under said levy to William F. Schmalsle, for \$1,100; that when such purchase was made the purchaser, William F. Schmalsle, had actual notice of the existence of the plaintiff's mortgage as well as constructive notice by the record thereof; that on the 9th day of October, 1886, the sheriff executed to William F. Schmalsle a deed conveying to him said property as sold under said execution, which deed was filed for record October 20, 1886. Upon this state of facts the court found as a conclusion of law that the judgment lien was paramount to the mortgage, and that the mortgage could not be "enforced against said property so levied upon to the exclusion of the said judgment or in priority thereto." So holding, the court denied the plaintiff a decree of foreclosure of her mortgage on said premises, and rendered judgment against her in favor of defendants William F. Schmalsle and Nelson A. Miles, from which judgment plaintiff appealed.

The question involved herein as to the relative force of a judgment lien, and a mortgage made and delivered prior to docketing of the judgment, but not recorded until after such docketing and levy of execution, must be solved by a consideration of the statute relating to the judgment lien and execution, and the statute providing for the conveyance of real estate or interest therein, and the effect of recording such conveyances or withholding the same from record. The statute fixing the judgment lien is found in section 307, Code Civil Proc., which provides: "Immediately after filing a judgment roll the clerk shall make proper entries of the judgment, under appropriate heads, or in the docket kept by him; and from the time the judgment is docketed it shall become a lien upon the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time, or which he may afterwards acquire, until said lien expires. The lien shall continue for six years unless the judgment be previously satisfied." The judgment lien here established by statute takes effect upon "the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time," or thereafter acquired. So, in section 313, Code Civil Proc., where the execution is provided for, the sheriff is required first to satisfy the judgment out of the personal property of the debtor, or, "if sufficient personal property cannot be found, then out of his real property; or, if the judgment be a lien upon real property, then out of the real property belonging to him, on the day when judgment was docketed or at any time thereafter." In *Rodgers v. Bonner*, 45 N. Y. 379, the court says: "A judgment is not a specific lien on any particular real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, either

legal or equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens." See, also, *School-District v. Werner*, 43 Iowa, 643.

In the case of *Conard v. Insurance Co.*, 1 Pet. 442, 7 L. Ed. 189, Mr. Justice Story, announcing the decision of the court, says: "Now it is not understood that a general lien by judgment on land constitutes, per se, a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interest, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor, for this purpose, relates back to the time of his judgment, so as to cut out intermediate incumbrances." In *Brown v. Pierce*, 7 Wall. 205, 19 L. Ed. 134, Mr. Justice Clifford, speaking for the court, declares the extent and effect of a judgment lien as follows: "Judgments were not liens at common law. * * * Different regulations, however, prevailed in different states, and in some neither a judgment nor a decree for the payment of money, except in cases of attachment or mesne process, created any preference in favor of the creditor, until the execution was issued and had been levied on the land. Where the lien is recognized, it confers a right to levy on the land to the exclusion of other adverse interests acquired subsequently to the judgment; but the lien constitutes no property or right in the land itself. * * * Express decision of this court is that the lien of a judgment constitutes no property in the land; that it is merely a general lien securing a preference over subsequently acquired interests in the property; but the settled rule in chancery is that a general rule is controlled in such courts so as to protect the rights of those who were previously entitled to an equitable interest in the lands, or in the proceeds thereof. Specific liens stand on a different footing, but it is well settled that a judgment creates only a general lien, and that the judgment creditor acquires thereby no higher or better right to the property or assets of the debtor, than the debtor himself had when the judgment was rendered, unless he can show some fraud or collusion to impair his rights. Correct statement of the rule is that the lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person. Guided by these considerations, the court of chancery will protect the equitable right of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered." In *re Howe*, 1 Paige (N. Y.) 125, 19 Am. Dec. 395; *Ells v. Tousley*, 1 Paige (N. Y.) 280; *Keirsted v. Avery*, 4 Paige (N. Y.) 15; *Lounsberry v. Purdy*, 11 Barb. (N. Y.) 490; *Averill v. Loucks*, 6 Barb. (N. Y.) 20. These eminent authorities are cited and quoted from as forcibly expressing the legal effect of a judgment lien generally. The correctness of the views expressed

is not questioned, so far as we are aware, throughout the whole range of authorities on this subject.

Notwithstanding these doctrines, if there is any provision in our statutes which changes the relative force of the judgment lien in the case at bar, as against the prior acquired mortgage, then the latter must be postponed to the former, as held by the trial court. It is insisted by counsel for respondent that a mortgage executed upon land in this state should not be regarded as a conveyance in the sense that applied to a mortgage at common law; that a mortgage on land, as known to our statute is a mere lien to secure the payment of money, and not a conveyance, as known to the common law. In support of this position, section 371, of the Code of Civil Procedure is cited, which provides as follows: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale." It is urged that this provision radically changes the character of a mortgage in this state from that incidental to a mortgage at common law, making the mortgage here simply a lien on land to secure the payment of money or the fulfillment of an obligation, which lien attaches at the time of the filing of the mortgage for record, and not before. It is true that this provision of statute modifies the conditions of a mortgage in this jurisdiction to the extent of withholding from the mortgagee the right of possession of the mortgaged premises, upon the breach of the conditions of the mortgage, without first a foreclosure and sale. Nevertheless, a mortgage by our statute is declared to be a conveyance. Chapter 20, div. 5, of our statutes, provides the manner by which "conveyances of land or any estate or interest therein, may be made by deed signed by the persons from whom the estate or interest is intended to pass;" and section 270 of that chapter provides: "The term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, alienated, mortgaged, or assigned, except wills, leases for a term not exceeding one year, and executory contracts for the sale or purchase of lands."

The mortgage in the case at bar is shown to have been executed in the manner provided in said chapter, for the execution of "conveyances of land, or any interest therein," and this mortgage is to be deemed a conveyance in the meaning of that term, as used in that chapter. By section 258 of said chapter, this conveyance is declared to be valid and binding, as between the parties thereto, without recording. Now, if that was a valid and binding conveyance of an equitable interest in said land, as between the plaintiff and her mortgagor, the mortgage interest had been effectually conveyed away prior to the attaching of the judgment lien on said land. In view of the doctrine held by the authorities cited, *supra*, the lien of the judgment, docketed subsequent to the conveyance of the mortgage interest, must have been subject

to it. This would be so, not only in consequence of general principles of law, but strictly by the provisions of statute. The statute establishing the judgment lien, as before noticed, fixes the lien on the real estate owned by the judgment debtor in the county at the time of docketing the judgment or afterwards acquired. Hence, if a valid and binding conveyance of an interest has been made by the debtor prior to the docketing of the judgment, then he did not own the interest so conveyed at the time of docketing the judgment, and the lien thereof could not attach to that which the judgment debtor did not own.

It cannot be maintained that the failure to record a mortgage defeats it, or postpones it to the lien of a judgment creditor, unless such failure continues until after sale under execution and purchase by one in good faith without notice. By section 259 of the chapter cited, *supra*, it is provided that the filing of the instrument of conveyance "shall impart notice to all persons of the contents thereof, and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice." And, again, in section 260 of the same chapter, it is provided that "every conveyance of real estate within this state, which shall not be recorded, as provided for in this chapter, shall be deemed void as against any subsequent purchasers in good faith, and for a valuable consideration of the same real estate or any portion thereof, where his own conveyance shall be first duly recorded." Neither these provisions nor any others found in the statute include judgment creditors so as to make the unrecorded mortgage void as against a judgment lien. This proposition is supported by numerous authorities where the statutory provisions are similar to those existing in this state. *Wilcoxson v. Miller*, 49 Cal. 193; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Packard v. Johnson*, 51 Cal. 545; *Galland v. Jackman*, 26 Cal. 80, 85 Am. Dec. 172; *Pixley v. Huggins*, 15 Cal. 128; *Thomas v. Vanlieu*, 28 Cal. 617; *Davis v. Owenby*, 14 Mo. 170, 55 Am. Dec. 105; *Valentine v. Havener*, 20 Mo. 133; *Holden v. Garrett*, 23 Kan. 98; *Knell v. Association*, 34 Md. 67; *Ells v. Touseley*, *supra*; *Hackett v. Callender*, 32 Vt. 97; *Hart v. Bank*, 33 Vt. 252; *Norton v. Williams*, 9 Iowa, 528.

Contrary to the authorities cited *supra*, our attention is called to an observation of Mr. Freeman in his work on Judgments (3d Ed., § 366) to the following effect: "In some states the registry laws so modify the effect of conveyances, and other instruments concerning real estate, as to give a judgment lien precedence over an unrecorded instrument of which the judgment creditor had no knowledge at the date of the attaching of the lien of his judgment." Also, note 1 to this observation, in which the author says: "The tendency of recent statutes, and the decisions interpreting them, is to give a judgment lien precedence over a prior unregistered conveyance or incumbrance, especially if the plaintiff had no notice of it when his judgment was docketed or registered or the levy of the writ made." In this connec-

tion respondent cites cases decided in the courts of last resort, in the states of Texas, Virginia, West Virginia, and Georgia. To these citations might have been added cases decided in Massachusetts, Ohio, Illinois, Pennsylvania, and, perhaps, other states. But, on examination of these decisions, and the statutes under which the same were made, we find provisions differing radically from those of our own state. In the states mentioned, the courts were confronted by statutory provisions which gave precedence to a judgment lien, as remarked by Mr. Freeman, either expressly or by fair implication, and the courts where these decisions are found were interpreting such statutes.

The weight of these citations rather tends to confirm us in the opinion that, under our statute, we could not fairly construe a judgment creditor's lien to be paramount to a bona fide mortgage, although not recorded at the time the judgment was docketed. It requires the force of statute to make a valid and binding unrecorded mortgage void as to the judgment creditor's lien in like manner as it requires statutory provisions to make an unrecorded deed or mortgage void as to subsequent purchasers or mortgagees. It has been held in *Chumasero v. Vial*, 3 Mont. 376, that the purchaser at execution sale is governed by the rule *caveat emptor*, and that if the judgment debtor was holding the legal title to real estate in trust for another, and such property was sold under execution against the trustee, in that case the purchaser acquired no title. In *McAdow v. Black*, 4 Mont. 475, 1 Pac. 751, it is held that "an execution creditor takes the property subject to any lien or equity that might be enforced against the judgment debtor." Is it not an irresistible logical conclusion from these principles that a judgment lien attaches to the real estate of the judgment debtor subject to any equities which might be enforced against the judgment debtor, and also against the purchaser under the execution sale with notice of such equities? We are of opinion that the court erred in concluding that the mortgage of appellant in the case at bar was inferior and subject to the judgment lien of respondent, or the title of respondent to said real estate, acquired by purchase at execution sale under said judgment, after having actual as well as constructive notice of respondent's mortgage on said premises. * * *

⁴ For other cases holding that the lien of a judgment will not hold against prior unrecorded deeds or mortgages, see *McCalla v. Investment Co.*, 77 Kan. 770, 94 Pac. 126, 14 L. R. A. (N. S.) 1258 (1908); *Trenton Banking Co. v. Duncan*, 86 N. Y. 221 (1881). The decisions, however, are conflicting; some cases holding that a judgment lien takes priority to such unrecorded claims in absence of actual notice. See *Richards v. Steiner Bros.*, 166 Ala. 353, 52 South. 200 (1910); *Gary v. Newton*, 201 Ill. 170, 66 N. E. 267 (1903).

PART IV

THE ACQUISITION AND TRANSFER OF REAL PROPERTY

TITLE—IN GENERAL

I. Public Grant ¹

UNITED STATES ex rel. McBRIDE v. SCHURZ.

(Supreme Court of United States, 1880. 102 U. S. 378, 26 L. Ed. 167.)

Error to the Supreme Court of the District of Columbia.

This is a petition for a mandamus, filed in the Supreme Court of the District of Columbia, Oct. 11, 1879. It alleges that the relator, Thomas McBride, was, in 1862, possessed of all the qualifications necessary to entitle him to pre-empt one hundred and sixty acres of the public lands of the United States; that he, in that year, settled upon a tract of public land known as the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and lots 1 and 2 of section 6, T. 3, S. of R. 5 W., situate in the county of Tooele and Territory of Utah, containing a little less than one hundred and sixty acres, with intent to appropriate it under the laws of the United States, and has continuously inhabited, occupied, and cultivated it; that he, May 31, 1869, in due form and time, made, at the land office in Salt Lake City, a homestead entry of it; that he occupied, cultivated, and resided upon it for more than five years thereafter, and, June 15, 1874, made due proof thereof, paid the fees, and received a final certificate therefor; that his said proofs and papers were duly forwarded to the Commissioner of the General Land-Office, who found them to be in all respects in compliance with law, and such as to entitle the relator to a patent; that, in accordance with that finding, a patent for the tract was, Sept. 26, 1877, duly signed, sealed, and, by the Recorder of the General Land-Office, countersigned and recorded in the proper land records of the United States; that it was, Oct. 3, 1877, transmitted by the commissioner to the local land-officers at Salt Lake City, with instructions to deliver it to the relator, and was received by them; that he appeared at said land-office, and demanded of them to deliver the patent to him; that they refused to do so, because they had been instructed by the commissioner, Oct. 14, 1877, to return it; that it was so returned Oct. 22, 1878, and was

¹ For discussion of principles, see Burdick, Real Prop. § 219.

then in the Department of the Interior, subject to the control of the Secretary of the Interior; that Carl Schurz is such Secretary; and that the relator, Oct. 6, 1879, demanded of him, at his office in the Department of the Interior, the delivery of said patent, but the Secretary, on the tenth day of that month, absolutely refused to deliver it. The petition prays that the writ of mandamus issue, directing the Secretary to deliver the patent to the relator. * * *

Mr. Justice MILLER, after stating the case, delivered the opinion of the court.² * * *

The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which is the Commissioner of the General Land-Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands.

Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.

But we have also held that when, by the action of these officers and of the President of the United States, in issuing a patent to a citizen, the title to the lands has passed from the government, the question as to the real ownership of them is open in the proper courts to all the considerations appropriate to the case. And this is so, whether the suit is by the United States to set aside the patent and recover back the title so conveyed, as in *United States v. Stone*, 2 Wall. 525, 17 L. Ed. 765, or by an individual to cause the title conveyed by the patent to be held in trust for him by the patentee on account of equitable circumstances which entitle the complainant to such relief. *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485, and other cases.

In the case before us it is said that the instrument called a patent, which purports in the name of the United States to convey to McBride the lands in controversy, is not effectual for that purpose for want of delivery. That though signed, sealed, countersigned, and recorded, and then sent to the register of the land-office at Salt Lake City for delivery to him, it never was so delivered, and has always remained under the control of the officers of the Land Department, and that

² Part of the statement of facts is omitted.

³ Part of the opinion is omitted.

the instrument is invalid as a deed of conveyance for want of delivery to the grantee. If it were conceded that delivery of the patent is essential to the transfer of title to the grantee, and that such delivery is required as is necessary in a conveyance from man to man, it would be a question of some difficulty to decide whether such delivery took place in this case. The well-known principle by which the intention of the grantor in a deed to make an act which falls far short of manual delivery, to stand for delivery, when so designed, might well be applied to the act of the commissioner in transmitting the patent by mail to the local office for the purpose of delivery; while, on the other hand, it is argued with much force that the instrument never actually passed from the land-office or the control of its officers. We do not think the decision of this point necessary to the case before us.

We are of opinion that when, upon the decision of the proper office that the citizen has become entitled to a patent for a portion of the public lands, such a patent made out in that office is signed by the President, sealed with the seal of the General Land-Office, countersigned by the recorder of the land-office, and duly recorded in the record-book kept for that purpose, it becomes a solemn public act of the government of the United States, and needs no further delivery or other authentication to make it perfect and valid. In such case the title to the land conveyed passes by matter of record to the grantee, and the delivery which is required when a deed is made by a private individual is not necessary to give effect to the granting clause of the instrument.

The authorities on this subject are numerous and uniform. They have their origin in the decisions of the English courts upon the grants of the crown evidenced by instruments called there, as here, patents.

Blackstone describes four modes of alienation or transfer of title to real estate, which he calls common assurance: the first of which is by matter in pais or deed; the second by matter of record, or an assurance transacted only in the king's public courts of record; the third by special custom; and the fourth by devise in a last will or testament.

In the chapter devoted to alienation by deed he enumerates among the requisites to its validity the act of delivery. Book 2, c. 20. But in chapter 21, devoted to alienation by matter of record, nothing is said about delivery as necessary to pass the title, and under this head he includes the king's grants. These, he says, are all made matter of public record, and are contained in charters or letters-patent. He then recites the processes by which patents are prepared and perfected, the various officers through whose hands they pass, and the manner of affixing the seal to them, and their final enrolment. They are then perfect grants, and no mention is made of delivery as a prerequisite to their validity. After this they can only be revoked or annulled by scire facias or other judicial proceeding. The importance attached to the delivery of the deed in modern conveyancing arises largely from

the fact that the deed has taken the place of the ancient livery of seisin in feudal times, when, in order to give effect to the enfeoffment of the new tenant, the act of delivering possession in a public and notorious manner was the essential evidence of the investiture of the title to the land. This became gradually diminished in importance until the manual delivery of a piece of the turf, and many other symbolical acts, became sufficient. When all this passed away, and the creation and transfer of estates in land by a written instrument, called the act or deed of the party, became the usual mode, the instrument was at first delivered on the land in lieu of livery of seisin. *Shepherd's Touchstone*, 54; *Co. Litt.* 266 b; *Washburn, Real Property*, book 3, 308. Finally, any delivery of the deed, or any act which the party intended to stand for such delivery, became effectual to pass the title. *Church v. Gilman*, 15 Wend. (N. Y.) 656, 30 Am. Dec. 82; *Butler v. Baker*, 3 Co. 25 b; *Warren v. Swett*, 31 N. H. 332; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67.

But in regard to the transfer of title by matter of record, whether this record were a judgment or decree in a court of justice, as fines and recoveries, or the record made in the proper office (generally in the Court of Chancery by the Lord Chancellor) of the king's grant, called enrolment, no delivery of seisin was necessary, nor any delivery of the document sealed with the king's seal; for when this seal was affixed to the instrument and the enrolment of it was made, no higher evidence could be had, nor was any other evidence necessary of this act or deed of the king. Hence, Mr. Cruise, in his *Digest of the English Law of Real Property*, says: "The king's letters-patent need no delivery; nor his patents under the great seal of the Duchy of Lancaster; for they are sufficiently authenticated and completed by the annexing of the respective seals to them." Title XXXIV. sect. 1, par. 3.

In *Marbury v. Madison* [1 Cranch, 137, 2 L. Ed. 60], to which we have already referred, the court, likening the commission of the justice of the peace, which was signed and sealed by the President and left in the hands of the Secretary of State, to a patent for lands, uses this language: "By the act passed in 1796, authorizing the sale of lands above the mouth of the Kentucky River (vol. iii. p. 229), the purchaser, on paying his purchase-money, becomes completely entitled to the property purchased, and on producing to the Secretary of State the receipt of the Treasurer, upon a certificate required by the law, the President of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the Secretary of State and recorded in his office. If the Secretary of State *should choose to withhold this patent*, or the patent being lost should refuse a copy of it, can it be imagined that the law furnishes to the injured party no remedy? *It is not believed that any person whatever would attempt to maintain such a proposition.*"

In another part of the opinion it is said: "In all cases of letters-patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign-manual of the President and the seal of the United States are those solemnities."

The same principle is found in the opinion of the court, delivered by Mr. Justice Story, in *Green v. Lister*, 8 Cranch, 229, 3 L. Ed. 545.

Many decisions of State courts of the highest character to the same effect are cited in the brief of counsel for the relator in this case, among which may be mentioned *Ex parte Kuhtman*, 3 Rich. Eq. (S. C.) 257, 55 Am. Dec. 642; *Donner v. Palmer*, 31 Cal. 500. The subject is very fully and ably discussed by Mr. Justice Field in the case of *Leroy v. Jamison*, 3 Sawy. 369, Fed. Cas. No. 8,271.

It is also said that there was no acceptance of this patent by the grantee, and for that reason it is ineffectual to convey title. It is not necessary to enter into much discussion on this subject, because the acceptance of a deed may be presumed under circumstances far short of what was admitted to exist in this case.

The doctrine on this point is well stated by Attorney-General Crittenden, in the case of *Pierre Mutelle*, in 1841, as found in 3 Op. Att.-Gen. 654, which was a case like the present, in regard to the duty of the Secretary to deliver the patent then lying in the office.

"My opinion," said he, "is that the title to the land *did pass to Pierre Mutelle at the date of the patent to him, though that patent still remains in the land-office without any actual tradition of it to any one.* The patent was issued by authority and direction of law, and upon general principles, *where the patentee does not expressly dissent*, his assent and acceptance are to be presumed from the beneficial nature of the grant. But it is hardly necessary to resort to such presumptions, because, in this and in all such cases, the acts required to be done by the claimant, and actually done by him in the preparation of his claim for patenting, are equivalent to a positive demand of the patent and amount to an acceptance of it. The patent, in the meaning of the act referred to, *is granted to the patentee from its date, though he may never actually see or receive it*, and is valid and effectual to pass the title to the land.

"All legal muniments of title belong to him who owns the land, * * * but as the patent is a recorded evidence of title, always accessible, no material prejudice can result to the true owner from a stranger getting possession of it."

The long pursuit of this claim by McBride, his repeated demand for the patent after it had been perfected, and his persistent effort to obtain possession of it, are ample proof of his acceptance of the grant of which it is the evidence.

It is argued with much plausibility that the relator was not entitled to the land by the laws of the United States, because it was not subject to homestead entry, and that the patent is, therefore, void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land.

We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

But the distinction between a void and a voidable instrument, though sometimes a very nice one, is still a well-recognized distinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. To the officers of the Land Department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that District generally had been opened to pre-emption, homestead entry, and sale. The question whether any particular tract, belonging to the government, was open to sale, pre-emption, or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.

It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made and recorded in the shape of the patent, how can it be said that the instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the government never had any, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land-officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void.

The mode of avoiding it, if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside, or correct it if only partly wrong. It was within the province of those officers to sell the land, and to decide to whom and for what price it should be sold; and when, in accordance with their decision, it was sold, the money paid for it, and the grant carried into effect by a duly executed patent, that instrument carried with it the title of the United States to the land.

From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land-officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title-deeds destroys his title.

What is this final act which closes the transaction?

In *Marbury v. Madison* (supra), this court was of opinion that when the commission of an officer was signed by the President and the seal of the United States affixed to it, the commission was complete, and the officer entitled to its possession could enforce its delivery by the writ of mandamus. In regard to patents for land, it may be somewhat different, and it is not necessary in this case to go quite so far.

But we may well consider that in all nations, as far as we know, where grants of the property of the government or of the crown are made by written instruments, provision is made for a record of these instruments in some public government office. Our experience in regard to Mexican, Spanish, and French grants of parts of the public domain purchased by us from those governments teaches us that such is the uniform law of those countries. We have already shown that under the English law all letters-patent are enrolled, and that this is the last act in the process of issuing a patent which is essential to its validity.

We are safe in saying that every State of the Union has similar provisions in reference to its grants of land, and it has been the effort of most of them to compel public record of all conveyances of land by individuals or corporations.

The acts of Congress provide for the record of all patents for land in an office, and in books kept for that purpose. An officer, called

the Recorder, is appointed to make and to keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction,—the legally prescribed act which completes what Blackstone calls "title by record;" and when this is done, the grantee is invested with that title.

We do not say that there may not be rare cases where all this has been done, and yet the officer in possession of the patent be not compellable to deliver it to the grantee. If, for instance, the secretary whom the President is authorized by law to appoint to sign his name to the patent should do so when he has been forbidden by the President, or if, by some mere clerical mistake, the intention of the officer performing an essential part in the execution of the patent has been frustrated. It is not necessary to decide on all the hypothetical cases that could be imagined.

But we are of opinion that when all that we have mentioned has been consciously and purposely done by each officer engaged in it, and where these officers have been acting in a matter within the scope of their duties, the legal title to the land passes to the grantee, and with it the right to the possession of the patent.

No further authority to consider the patentee's case remains in the land-office. No right to consider whether he ought in equity, or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner,—a duty which, within all the definitions, can be enforced by the writ of mandamus.

It is not always that the ill consequences of a principle should control a court in deciding what the established law on a particular subject is, and in the delicate matter of controlling the action of a high officer of the executive branch of the government, it would certainly not alone be sufficient to justify judicial interposition. But it may tend to reconcile us to such action as we feel forced to take, under settled doctrines of the courts, to see that any other course would lead to irremediable injustice.

If the relator in this case cannot obtain his patent, he is wholly without remedy. He cannot sue the United States, in whom is the title in the absence of the patent; for the United States can be sued in no other court than the Court of Claims, and we have decided that that court has no jurisdiction in such a case. *Bonner v. United States*, 9 Wall. 156, 19 L. Ed. 666. There is no one else to sue, for the title is either in the relator or the United States. It may be many years before the city of Grantsville, the party now claiming against him, will get a patent, and it may never do so.

The relator is, therefore, utterly without remedy, if the land be rightfully his, until he can obtain possession of this evidence of his title.

On the other hand, when he obtains this possession, if there be any equitable reason why, as against the government, he should not have it,—if it has been issued without authority of law, or by mistake of facts, or by fraud of the grantee,—the United States can, by a bill in chancery, have a decree annulling the patent, or possibly a writ of scire facias. If another party (as the city of Grantsville) is, for any of the reasons cognizable in a court of equity, entitled, as against the relator, to have the title which the patent conveys to him, a court of chancery can give similar relief to the city as soon as the patent comes into his possession, or perhaps before. So that it is plain that by non-action of the Land Department the legal rights of the parties may remain indefinitely undecided, and those of the relator seriously embarrassed or totally defeated, while the delivery of the patent, under the writ of mandamus, opens to all the parties the portals of the courts where their rights can be judicially determined.

We are of opinion that the relator in the case, as presented to us, is entitled to the possession of the patent which he demanded, and that the writ of mandamus by the Supreme Court of the District of Columbia is the appropriate remedy to enforce that right. The judgment of that court will be reversed, and the case remanded with instructions to issue the writ; and it is so ordered.

Mr. Chief Justice WAITE, with whom concurred Mr. Justice SWAYNE, dissented.*

RIERSON v. ST. LOUIS & S. F. RY. CO.

(Supreme Court of Kansas, 1898. 59 Kan. 32, 51 Pac. 901.)

Error from district court, Greenwood county; C. W. Shinn, Judge.

Action by Winston Rierson against the St. Louis & San Francisco Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

JOHNSTON, J. This was an action by Winston Rierson to recover from the railway company a strip of land which had been used as a right of way for its railroad since the early part of the year 1880. The land over which the right of way was located was a part of that ceded to the United States by the Great and Little Osage Indians through the treaty concluded on September 29, 1865, and proclaimed by the president on January 21, 1867. With a view of purchasing the land from the United States, Rierson settled upon it in September, 1880, some time after the right of way was granted, and the railroad was in operation over the land in question. On June 6, 1888, Rierson received from the United States a patent for the land settled upon, no exception being made of the easement for right of way, and he has been continuously in the possession of the land since

* The dissenting opinion is omitted.

that time, except the part used as the right of way. The St. Louis, Wichita & Western Railway Company was duly incorporated in 1879, and in August and September of that year it surveyed its road and located its right of way over the lands in controversy, and in March, 1880, completed the construction of its railroad across the same. Prior to March 16, 1880, the railway company proceeded to obtain a right of way over the land in accordance with the requirements of "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875, by filing a copy of its articles of incorporation and due proofs of its organization thereunder; all of which were duly approved. Subsequently, and before June 1, 1888, the company filed a map and profile of its road, and on the day last mentioned they were approved by the secretary of the interior. The railway company continued to operate its railroad until the transfer of the same, together with all its property and franchises, to its successor, the St. Louis & San Francisco Railway Company, which since that time has continuously operated the railroad. The trial court found that the railway company acquired its right of way by the proceedings taken in 1880, and that Rierson took his title from the United States subject to the easement which the company had previously acquired.

In our view, a correct conclusion was reached. According to the findings of the trial court, the rights of the railway company were acquired before settlement was made on the land by the plaintiff, or any rights therein were obtained by him. He insists that this, with other findings, is not supported by the testimony, but, as the case-made does not show that it contains all the evidence, we must accept the facts as stated in the findings.

There is a contention that the lands ceded are not public lands, within the meaning of the act under which the railway company claims to have acquired its rights, and therefore no right of way was ever obtained by it. As will be observed, the lands were ceded to the United States to be surveyed and sold under the direction of the commissioner of the general land office at a price not less than \$1.25 per acre, as other lands are surveyed and sold, under such rules and regulations as the secretary of the interior should from time to time prescribe. The proceeds of the sale, less the expenses incurred, were to be placed in the treasury of the United States to the credit of the Indians, and were to be thereafter expended for purposes mentioned in the treaty. There was a provision that the Indians should remove from the ceded lands within six months after the ratification of the treaty, and should settle upon their diminished reservation. The Indians having surrendered the right of occupancy, and ceded their lands to the United States, with power of sale and disposal, there can be no doubt that the general government had power to grant a right of way over the lands. By the act of March 3, 1875, it was enacted "that right of way through the public lands of the United States is

hereby granted to any railroad company duly organized under the laws of any state or territory," etc. 1 Supp. Rev. St. 1891, p. 91.

Can the ceded lands be regarded as public lands within the meaning of this act? It has been held that "the words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*, 92 U. S. 763, 23 L. Ed. 769; *Bardon v. Railroad Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806. By the terms of the treaty the ceded lands were to be sold by the United States as other public lands were sold, and, as they must be sold under general laws and regulations, they fall fairly within the definition of public lands given by the supreme court of the United States. See, also, *Roberts v. Railway Co.*, 43 Kan. 102, 22 Pac. 1006. The act of March 3, 1875, provides that its provisions shall not apply to lands reserved from sale; but here, in addition to the title held by the United States as original proprietor, specific authority was given to sell the lands as other public lands are sold. Provision was made in the treaty for right of way to railroad companies over the land not ceded, and which remained to the Indians, but no provision was made nor limitations placed upon the power of the United States as to granting a right of way over the lands which had been ceded. Being public lands, it follows that upon compliance with the provisions of the act of March 3, 1875, the company would acquire a right of way. The court found that the company had complied with the requirements of the act, and, if we could measure the sufficiency of the evidence from what is preserved in the record, we would be compelled to hold that there was enough to sustain the finding.

Complaint is made that a copy of the map filed with the secretary of the interior was received in evidence without sufficient identification. It appears to be an exemplification of the original which was filed in the department of the interior by the railway company, certified by the commissioner of the general land office to be a literal copy of the original, and upon its face it appears to cover the land in controversy. Exemplifications of this character are admitted in evidence with like effect as originals, when they are attested by the officers having custody of the originals. Gen. St. 1897, c. 97, § 10. Attached to the original map, and made a part of the same, are the affidavits of the officers of the company, showing that the route surveyed was represented by the map, that it had been indorsed by the board of directors of the company, and that it was filed for and in behalf of the company in order to obtain the right of way under the above-mentioned act of congress. The map shows and the record recites that it was filed and approved in the department of the interior on June 1, 1880.

Another objection to its reception is that there is no indorsement upon the same showing that it was filed in the land office at Independence, Kan., being the office for the district within which the land in question was situated. The important step in the proceeding was the

approval of the secretary of the interior. His approval was a quasi judicial act; and when his decision is made, and approval given, it may fairly be presumed that the formalities to be observed and preceding steps to be taken by the railway company have been observed and taken. Aside from that, however, there is proof that the map was filed in the land office at Independence. An exemplification of a letter of the register of the land office at that place was introduced in evidence, showing that the maps of location of the railroad were filed in that office on April 27, 1880. It was a letter which accompanied the maps, addressed to the commissioner of the general land office, and was at least competent for the purpose of showing that the map had been filed in the land office at Independence. The letter of the register of the land office at Wichita, to which objection is made, appears to have no bearing on the case, and, being immaterial, no prejudice resulted from its admission.

We find no substantial error in the proceedings, and therefore the judgment of the district court will be affirmed. All the justices concurring.

SIMS v. MORRISON.

(Supreme Court of Minnesota, 1904. 92 Minn. 341, 100 N. W. 88.)

Appeal from District Court, Itasca County; W. S. McClenahan, Judge.

Action by Thomas W. Sims against Harriet Morrison and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

BROWN, J. Appeal from an order sustaining a general demurrer to the complaint. The facts stated in the complaint are, in substance, as follows:

On August 16, 1894, one Roberts, through whom plaintiff claims, made homestead entry of the land in controversy; entered upon and continued his residence thereon until July, 1900, when he made and submitted to the Interior Department final proof of his entry and settlement. Prior to making final proof, on September 22, 1899, one O'Connell filed a contest against his entry, alleging as a basis thereof that Roberts had abandoned his claim. The contest was decided by the local land office adversely to O'Connell and in favor of Roberts, which decision was affirmed by the Commissioner of the General Land Office, and later by the Secretary of the Interior; the decision of the latter official having been made on the 23d of November, 1900. One James H. Morrison also entered a contest against Roberts, alleging an abandonment of the claim by him, and this contest was pending and undetermined at the time the Secretary of the Interior rendered his decision adverse to the O'Connell contest. On December 13, 1900, subsequent to making final proof, and during the pendency of the Mor-

ri son contest, Roberts deeded or attempted to transfer to plaintiff the timber then standing and growing upon the land. Prior to that date no final receipt or patent had ever been issued to Roberts. In fact, none was ever issued to him. Subsequently, on April 1, 1901, Morrison was permitted to amend his notice of contest against the Roberts entry by adding, as a new ground therefor, the sale or attempted sale of the timber by Roberts to plaintiff.

The complaint further alleges that a special agent of the Interior Department called upon Roberts, and represented to him that he had violated the law by making a sale of the timber before the issuance of the final receipt, and was subject to the punishment prescribed therefor by the homestead laws. Thereafter, on July 6, 1901, said Roberts, influenced thereto by threats of prosecution by said agent, and in consideration of the sum of \$100 to him paid by Morrison, relinquished his entry to the general government, and the officers of the Interior Department permitted Morrison to file thereon under an act of Congress known as the "Stone and Timber Act." Morrison subsequently died, and his heirs, the defendants in this action, made payment for the land under his entry, and final receipt was issued to them. Plaintiff brought this action, basing his right of recovery upon his contract with Roberts, and demands judgment that the plaintiff be decreed the owner of all the timber standing upon the land in question, and that it be further decreed that defendants have no title or right to said timber, but title to the land only, and adjudging and decreeing also that defendants be compelled to convey to plaintiff, by good and sufficient title, the timber, and, if they fail to do so, that title thereto be vested in plaintiff by judgment and decree of the court.

The trial court sustained defendants' demurrer to the complaint on the ground that the action, being one to impress the land with a trust in favor of plaintiff, could not be maintained so long as the legal title to the land remained in the government. Whether the trial court was right in this conclusion is the only question for our consideration.

We are not concerned with the question whether plaintiff's contract with Roberts was valid or invalid. If valid, it vested in plaintiff an interest in the land, for the timber attempted to be conveyed thereby was a part of the realty. It is probable, within some of the decisions of the Interior Department, including those of the Commissioner of the General Land Office and the Secretary of the Interior, that the contract, though made before final receipt was issued to Roberts, was valid and enforceable. The cases cited by appellant sustain the general proposition that an entryman under the homestead laws may, after he has perfected final proof of his entry, sell and convey the land to a third person before final receipt or patent is issued, and vest in the purchaser all rights possessed by him. In such cases the government will, upon proper showing, issue the patent to the purchaser. *Magalia Gold Min. Co. v. Ferguson*, 6 Land Dec. Dep. Int. 218; *Orr v. Breach*, 7 Land Dec. Dep. Int. 292; *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup.

Ct. 122, 32 L. Ed. 482. But rights thus acquired are equitable in their nature, and must be adjusted in the Land Department, where relief is sought before patent issues. So it may be conceded for the purposes of this case that the Roberts contract was a valid transfer to plaintiff of the timber standing upon the land, and we are confronted with the question whether the rights thus acquired may be enforced in the courts before the legal title to the land has passed from the government.

The object of this action is to impress the land in the hands of defendants with a trust in favor of plaintiff, to the extent that plaintiff may be awarded the right to enter into possession of the same for the purpose of cutting and removing the timber under the Roberts contract. The legal title to the land is in the general government. No final receipt was ever issued to Roberts under his homestead entry and final proof, and, subsequent to making the contract with plaintiff here relied upon, he relinquished his entry, and the ancestor of defendants was permitted to file thereon, and to defendants, upon final proof under his entry, a final receipt was issued. Morrison had full notice of whatever rights plaintiff had under the Roberts contract at the time of filing upon the land, and he took the same subject to whatever rights plaintiff had therein. Defendants, his heirs, are in no better position than he would have been, had he lived; and this action been brought against him. But these facts are unimportant. The question presented is whether the court has jurisdiction to grant such relief, and adjust the equities of the parties, before the legal title has passed from the general government, notwithstanding the validity of the Roberts contract, and that defendants are bound thereby.

A trust, as remarked by Justice Mitchell in *Hospes v. N. W. Mfg. Co.*, 48 Minn. 192, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637, implies two estates or interests—one equitable and one legal; one person, as trustee, holding the legal title, while another, as cestui que trust, has the beneficial or equitable interest. This is an accurate statement of the general rule running through all the adjudged cases, and none are cited holding that real property will be impressed with a trust against one who holds only an equitable title. The rule applies with greater force to the case at bar, for here the legal title to the land is in the general government, with no certainty that it will ever become vested in defendants, and the rights of both are purely equitable. The government has the paramount and sole authority to dispose of its lands, and, until it parts with and conveys its title, the courts are powerless to aid litigants in controversies affecting or involving individual claims thereto. Actions involving merely possessory rights do not come within that rule. Actions of that nature, though the legal title be in the government, may be entertained in the courts, and full and adequate relief granted the contending parties, even before the legal title has passed from the government. That rule was followed and applied in *Matthews v. O'Brien*, 84 Minn. 505, 88 N. W. 12, and

in *Michaelis v. Michaelis*, 43 Minn. 123, 44 N. W. 1149. But controversies involving the legal title must be fought out before the land department of the general government. Gen. St. 1894, § 5754, providing that the receiver's final receipt issued by the United States Land Office is *prima facie* evidence of title, does not change the general rule in this respect. That statute is a mere rule of evidence, and was not intended to create or vest title to government lands, and it cannot be construed as fixing a time when the title to such lands passes to an entryman under the homestead laws.

The action at bar is something more than one involving the possession of the land—it involves an interest in the land—and the relief prayed for cannot, within the authorities, be granted by the courts until the government has parted with its title. It was said in *Brown v. Hitchcock*, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772—an action involving rights in government land: “In this case the record discloses no patent, and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the state, the legal title remained in the United States. Until the legal title to public land passes from the government, inquiry as to all equitable rights comes within the cognizance of the Land Department.” The rule is clearly stated in *McCord v. Hill*, 104 Wis. 457, 80 N. W. 735, as follows: “It is only after the United States has parted with its title, and the individual has become vested with it, that the equities on which he holds it may be enforced, and not before. * * * Such being the law, a complaint which seeks to have the court adjust equities between rival claimants to government lands is fatally defective, if it fails to show that the title has become vested in the individual against whom it is sought to enforce supposed equities.” See, also, *Empey v. Plugert*, 64 Wis. 603, 25 N. W. 560; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800; *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *In re Emblem*, 161 U. S. 52, 16 Sup. Ct. 487, 40 L. Ed. 613.

For these reasons, the court below properly sustained the demurrer to plaintiff's complaint, and the order appealed from is affirmed.

II. Private Grant ⁵

1. CONVEYANCES AT COMMON LAW AND UNDER STATUTE OF USES

JACKSON *ex dem.* GOUCH *v.* WOOD.

(Supreme Court of Judicature of New York, 1815. 12 Johns. 73.)

This was an action of ejectment for lot No. 7, in the town of Locke, in the county of Onondaga, and was tried before Mr. Justice Thompson, at the Cayuga circuit, in June, 1813.

⁵ For discussion of principles, see *Burdick*, Real Prop. §§ 221-226.

The lessors of the plaintiff gave in evidence the exemplification of a patent, dated the 13th of June, 1791, to John Day for the lot in question. He then proved that Moses Gouch was the identical person who served, and was known in the New York line of the army by the name of John Day, and that he was the same person to whom the patent was granted by that name. It was also proved, that Moses Gouch, alias dictus John Day was dead, and that the lessors of the plaintiff were his heirs at law.

The defendant gave in evidence an instrument in writing endorsed on the original patent, dated the 19th of November, 1792, signed

“John ^{his} x Day,” but without any seal, by which he, John Day, for ^{mark}

the consideration of ten pounds, paid to him by Benjamin Prescott, bargained, sold, remised, released and quit-claimed to the said Benjamin Prescott, his heirs and assigns, all his right, title, claim, and interest, of, in, and to the premises granted and described in the patent, to have and to hold the same to the said Benjamin Prescott, and to his heirs and assigns, to his and their only proper use and benefit forever; and to this instrument the names of two witnesses are subscribed.

There never having been any seal to the writing thus endorsed on the patent, it was objected, on the part of the plaintiff, that it amounted to no more than a parol contract, and was not sufficient to pass the land. This point was reserved by the judge, and the defendant gave in evidence sundry mesne conveyances from Benjamin Prescott to himself, all of which had been duly recorded: he also showed a possession for seven or eight years. A verdict was taken for the plaintiff, subject to the opinion of the Court, on a case, as above stated.

PLATT, J., delivered the opinion of the Court.

The single question in this case is, whether an estate in fee can be conveyed otherwise than by deed; that is to say, whether a seal is essential to such conveyance.

The earliest mode of transferring a freehold estate, known in the English common law, was by livery of seisin only. Co. Lit. 49, b. 48, b. But when the art of writing became common among our rude ancestors, the deed of feoffment was introduced, in order to ascertain with more precision the nature and extent of the estate granted, with the various conditions and limitations. This deed, however, was of no validity, unless accompanied by the old ceremony of livery and seisin. 2 Blacks. Com. 318.

The statute of uses (27 Hen. VIII.) gave rise to the deed of bargain and sale; and, soon afterwards, the conveyance by lease and release was introduced, in order to avoid the necessity of enrolment, required by the statute of 27 Hen. VIII. 2 Black. Com. 343. By virtue of the statute of uses, which we have adopted, (without the proviso in the English statute requiring the enrolment of deeds,) the deed of bargain and sale, now in use here, is equivalent to the deed of feoffment with

livery of seisin, (2 Black. Com. 339, 343,) and has, in practice, superseded the lease and release.

By the common law, estates less than a freehold might be created or assigned, either by deed, by writing without seal, or by parol merely.

By the 29 Car. II. c. 3, (9th and 10th sections of our "act for the prevention of frauds,") it was enacted, "that all leases, estates, interest of freehold, or terms of years, or any uncertain interests in lands, &c., made or executed by livery and seisin only, or by parol, and not in writing, and signed by the parties so making and creating the same, shall have the force and effect of leases or estates at will only; excepting leases for three years and less," &c.; and, "that no leases, estates, or interests, either of freehold, or terms of years," &c. "in any lands," &c. "shall, at any time hereafter, be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same," &c.

Now, it is contended on the part of the defendant, that the common law mode of conveyancing has been so modified by this statute, as to destroy the distinction between an estate of freehold, and an estate less than a freehold, as it regards the mode of alienation; and that either may now be conveyed by "note in writing" without seal, as well as by deed.

No direct decision appears to have been made on this point; but in the case of *Fry v. Philips*, 5 Burr. 2827, and in the case of *Holliday v. Marshall*, 7 Johns. 211, it was decided, that a written assignment of a lease for ninety-nine years was valid, though not sealed; upon the express ground that it was the sale of a chattel-real, for which the statute of frauds requires only a "note in writing;" plainly recognizing the distinction between a term for years, and a freehold estate, as to the mode of conveyance.

According to Sir William Blackstone, (2 Black. Com. 309,) &c., sealing was not in general use among our Saxon ancestors. Their custom was, for such as could write, to sign their names, and to affix the sign of the cross; and those who could not write, made their mark in sign of the cross, as is still continued to this day. The Normans used the practice of sealing only, without writing their names; and, at the conquest, they introduced into England waxen seals, instead of the former English mode of writing their names and affixing the sign of the cross, it being then usual for every freeman to have his distinct and particular seal. The neglect of signing, and resting upon the authenticity of seals alone, continued for several ages, during which time it was held, by all the English courts, that sealing alone was sufficient. But in the process of time, the practice of using particular and appropriate seals, was, in a great measure, disused; and Sir William Blackstone, (2 Black. Com. 310,) seems to consider the statute of 29 Car. II. c. 3 (of which the 9th and 10th sections of our statute of

frauds are a copy) as reviving the ancient Saxon custom of signing, without dispensing with the seal, as then in use, under the custom derived from the Normans.

We have the authority of that learned commentator, unequivocally in favor of the opinion, that a seal is indispensable, in order to convey an estate in fee simple, fee tail, or for life. 2 Black. Com. 297, 312.

Such seems to have been the practical construction, ever since the statute of Car. II. in England, and under our statute of frauds in this state; and to decide now, that a seal is unnecessary to pass a fee, would be to introduce a new rule of conveyancing, contrary to the received opinion, and almost universal practice in our community, and dangerous in its retrospective operation. Construing this statute with reference to the preëxisting common law, and the particular evil intended to be remedied, I think the legislature did not intend to dispense with a seal, where it was before required, as in a conveyance of a freehold estate; but the object was to require such deeds to be signed also, which the courts had decided to be unnecessary.

I construe this statute as though the form of expression had been thus: "No estate of freehold shall be granted, unless it be by deed signed by the party granting; and no estate less than a freehold (excepting leases for three years, &c.) shall be granted or surrendered, unless by deed, or note in writing signed by the grantor."

This venerable custom of sealing, is a relic of ancient wisdom, and is not without its real use at this day. There is yet some degree of solemnity in this form of conveyance. A seal attracts attention, and excites caution in illiterate persons, and thereby operates as a security against fraud.

If a man's freehold might be conveyed by a mere note in writing, he might more easily be imposed on, by procuring his signature to such a conveyance, when he really supposed he was signing a receipt, a promissory note, or a mere letter.

The plaintiff is entitled to judgment.

Judgment for the plaintiff.

III. Title by Estoppel *

PERKINS v. COLEMAN.

(Court of Appeals of Kentucky, 1890. 90 Ky. 611, 14 S. W. 640.)

Appeal from circuit court, Henderson county.

Ejectment by C. G. Perkins and others, heirs of N. G. Terry, against L. W. Coleman and others. Terry, who only owned an undivided half interest in the land, conveyed the whole of it to one Hor-

* For discussion of principles, see Burdick, Real Prop. §§ 227, 228.

ace Durham by deed of general warranty. Subsequently, Terry inherited the other half. Defendants claimed that the deed of general warranty estopped plaintiffs from asserting title to the land, but defendants did not show that they claimed under Durham, either by purchase, inheritance, or otherwise. There was a judgment for defendants, and plaintiffs appeal.

BENNETT, J. N. G. Terry owned an undivided interest in the land in controversy, and conveyed the whole of it to Horace Durham, by deed of general warranty. Thereafter, Terry inherited that part of the land that he did not own, and this action of ejectment is brought by Terry's heirs to recover the possession of that part of the land, thus inherited, from the appellee. He resists the right of the appellants to recover the said land, upon the ground that the title that Terry inherited was transferred to his vendee by estoppel. The appellants contend that the doctrine of estoppel does not protect strangers to the transaction, but only the parties and privies are bound thereby; and, as the appellee is neither party nor privy, he cannot avail himself of the estoppel that would bar the appellant's right, as against Durham, or his privies.

It is true that where the estoppel merely affects the consciences of the parties, and not the title, it does not operate on strangers to the transaction; but, where it "works an interest in the land" conveyed, "it runs with it, and is a title." Where it clearly appears from the writing that the vendor has conveyed, or agrees to convey, a good and sufficient title, and not merely his present interest in the land, the agreement runs with the land, and repeats itself every day; and if the vendor, at the time of the conveyance, has not the title to the land, but subsequently acquires the title, it "eo instante" inures to the benefit of the vendee and his privies. In other words, it is immediately transferred, by the law of estoppel, to the vendee and his privies, because by the contract which daily repeats itself, the vendor's title, whenever acquired, is transferred to the vendee and his privies. Consequently a stranger to the transaction, in an action of ejectment by the vendor against him, where he must recover upon the strength of his own title, and not upon the weakness of his adversary's, may show that he has thus parted with his title.

The judgment is affirmed.⁷

⁷ In accord with the holding of the preceding case to the effect that, by the doctrine of estoppel, an after-acquired title is transferred to the vendee and his privies, is the great weight of authority. See *Burdick*, *Real Prop.* p. 623, and cases cited. Other cases hold, however, that the title does not pass to the grantee, but that the effect of estoppel merely prevents the grantor from setting up his after-acquired title against the grantee. See *Id.* With reference, however, to the decision in *Perkins v. Coleman*, *supra*, that a stranger may plead an estoppel in connection with an after-acquired title, the weight of authority holds that the rule is the same as to an estoppel to assert an after-acquired title as in the case of an ordinary estoppel by deed, namely, that

AYER v. PHILADELPHIA & BOSTON FACE BRICK CO.

(Supreme Judicial Court of Massachusetts, 1893. 159 Mass. 84, 34 N. E. 177.)

Exceptions from superior court, Suffolk county; John W. Hammond, Judge.

Writ of entry to foreclose a mortgage, brought by Frederick N. Ayer against the Philadelphia & Boston Face Brick Company. Demandant obtained judgment. The tenant excepts. Exceptions overruled.

HOLMES, J. When the case was before us the first time (157 Mass. 57, 31 N. E. 717) it was assumed by the tenant that the only question was whether the covenant of warranty in the second mortgage should be construed as warranting against the first mortgage. No attempt was made to deny that, if it was so construed, the title afterwards acquired by the mortgagor would inure to the benefit of the second mortgagee under the established American doctrine. The tenant now desires to reopen the agreed facts for the purpose of showing that after a breach of the covenant in the second mortgage, and before he repurchased the land, the mortgagor went into bankruptcy, and got his discharge. The judge below ruled that the discharge was immaterial, and for that reason alone declined to reopen the agreed statement, and the case comes before us upon an exception to that ruling.

The tenant's counsel frankly avow their own opinion that the discharge in bankruptcy makes no difference; but they say that the inuring of an after-acquired title by virtue of a covenant of warranty must be due either to a representation or to a promise contained in the covenant, and that, if it is due to the former,—which they deem the correct doctrine,—then they are entitled to judgment on the agreed statement of facts as it stands, on the ground that there can be no estoppel by an instrument when the truth appears on the face of it, and that in this case the deed showed that the grantor was conveying land subject to a mortgage. If, however, contrary to their opinion, the title inures by reason of the promise in the covenant, or to prevent circuity of action, then they say the provision is discharged by the discharge in bankruptcy.

However anomalous what we have called the "American doctrine" may be, as argued by Mr. Rawle and others, (Rawle, *Cov.*, 5th Ed., § 247 et seq.) it is settled in this state as well as elsewhere. It is settled also that a discharge in bankruptcy has no effect on this operation of the covenant of warranty in an ordinary deed when the warranty is

strangers to the deed are not bound by the estoppel neither can they invoke it. For the collected cases, see 16 Cyc. 710. In a recent Canadian case, however (Robertson v. Daley, 11 Ont. 352), it is held that estoppel operates against strangers. See, also, *Somes v. Skinner*, 3 Pick. (Mass.) 52 (1825).

coextensive with the grant. *Bush v. Person*, 18 How. 82, 15 L. Ed. 273; *Russ v. Alpaugh*, 118 Mass. 369, 376, 19 Am. Rep. 464; *Gibbs v. Thayer*, 6 Cush. 30; *Cole v. Raymond*, 9 Gray, 217; *Rawle, Cov.* § 251.

It would be to introduce further technicality into an artificial doctrine if a different rule should be applied where the conveyance is of land subject to a mortgage against which the grantor covenants to warrant and defend. No reason has been offered for such a distinction, nor do we perceive any.

But it is said that the operation of the covenant must be rested on some general principle, and cannot be left to stand simply as an unjustified peculiarity of a particular transaction without analogies elsewhere in the law, and that this general principle can be found only in the doctrine of estoppel by representation, if it is held, as the cases cited, and many others, show, that the estoppel does not depend on personal liability for damages. *Rawle, Cov.* § 251.

If the American rule is an anomaly, it gains no strength by being referred to a principle which does not justify it in fact and by sound reasoning. The title may be said to inure by way of estoppel when explaining the reason why a discharge in bankruptcy does not affect this operation of the warranty, but, if so, the existence of the estoppel does not rest on the prevention of fraud, or on the fact of a representation actually believed to be true. It is a technical effect of a technical representation, the extent of which is determined by the scope of the words devoted to making it. A subsequent title would inure to the grantor when the grant was of an unincumbered fee, although the parties agreed by parol that there was a mortgage outstanding, (*Chamberlain v. Meeder*, 16 N. H. 381, 384. See *Jenkins v. Collard*, 145 U. S. 546, 560, 12 Sup. Ct. 868, 36 L. Ed. 812) and this shows that the estoppel is determined by the scope of the conventional assertion, not by any question of fraud or of actual belief. But the scope of the conventional assertion is determined by the scope of the warranty which contains it. Usually the warranty is of what is granted, and therefore the scope of it is determined by the scope of the description; but this is not necessarily so, and when the warranty says that the grantor is to be taken as assuring you that he owns and will defend you in the unincumbered fee, it does not matter that by the same deed he avows the assertion not to be the fact. The warranty is intended to fix the extent of responsibility assumed, and by that the grantor makes himself answerable for the fact being true. In short, if a man by a deed says, "I hereby estop myself to deny a fact," it does not matter that he recites as a preliminary that the fact is not true. The difference between a warranty and an ordinary statement in a deed is that the operation and effect of the latter depend on the whole context of the deed, whereas the warranty is put in for the express purpose of estopping the grantor to the extent of its words. The reason "why the

estoppel should operate is that such was the obvious intention of the parties." *Blake v. Tucker*, 12 Vt. 39, 45.

If a general covenant of warranty following a conveyance of only the grantor's right, title, and interest were made in such a form that it was construed as more extensive than the conveyance, there would be an estoppel coextensive with the covenant. See *Blanchard v. Brooks*, 12 Pick. 47, 66, 67; *Bigelow, Estop.* (5th Ed.) 403. So in the case of a deed by an heir presumptive of his expectancy with a covenant of warranty. In this case, of course, there is no pretense that the grantor has a title coextensive with his warranty. *Trull v. Eastman*, 3 Metc. (Mass.) 121, 124, 37 Am. Dec. 126. In *Lincoln v. Emerson*, 108 Mass. 87, a first mortgage was mentioned in the covenant against incumbrances in a second mortgage, but was not excepted from the covenant or warranty. The title of the mortgagor under a foreclosure of the first mortgage was held to inure to an assignee of the second mortgage. Here the deed disclosed the truth, and for the purposes of the tenant's argument it cannot matter what part of the deed discloses the truth, unless it should be suggested that a covenant of warranty cannot be made more extensive than the grant, which was held not to be the law in our former decision. See, also, *Calvert v. Sebright*, 15 Beav. 156, 160.

The question remains whether the tenant stands better as a purchaser without actual notice, assuming that he had not actual notice of the second mortgage.

"It has been the settled law of this commonwealth for nearly forty years that, under a deed with covenants of warranty from one capable of executing it, a title afterwards acquired by the grantor inures by way of estoppel to the grantee, not only as against the grantor, but also as against one holding by descent or grant from him after acquiring the new title. *Somes v. Skinner*, 3 Pick. 52; *White v. Patten*, 24 Pick. 324; *Russ v. Alpaugh*, 118 Mass. 369, 376, 19 Am. Rep. 464. We are aware that this rule, especially as applied to subsequent grantees, while followed in some states, has been criticised in others. See *Rawle, Cov.* (4th Ed.) 427 et seq. But it has been too long established and acted on in Massachusetts to be changed except by legislation." *Knight v. Thayer*, 125 Mass. 25, 27; *Powers v. Patten*, 71 Me. 583, 587, 589; *McCusker v. McEvey*, 9 R. I. 528, 11 Am. Rep. 295; *Tefft v. Munson*, 57 N. Y. 97.

It is urged for the tenant this rule should not be extended; but if it is a bad rule that is no reason for making a bad exception to it. As the title would have inured as against a subsequent purchaser from the mortgagor had his deed made no mention of the mortgage, and as by our decision his covenant of warranty operates by way of estoppel, notwithstanding the mention of the mortgage, no intelligible reason can be stated why the estoppel should bind a purchaser without actual notice in the former case, and not bind him in the latter.

Upon the whole case we are of opinion that the demandant is entitled to judgment. Our conclusion is in accord with the decision in a very similar case in Minnesota. *Manufacturing Co. v. Zellmer*, 48 Minn. 408, 51 N. W. 379.

Exceptions overruled.

IV. Title by Adverse Possession *

1. REQUISITES FOR TITLE BY ADVERSE POSSESSION

WARD v. COCHRAN.

(Supreme Court of United States, 1893. 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195.)

In error to the circuit court of the United States for the district of Nebraska. Reversed.

Statement by Mr. Justice SHIRAS:

This was an action of ejectment brought at November term, 1887, in the circuit court of the United States for the district of Nebraska, by Seth E. Ward, a citizen of the state of Missouri, against Elmer G. Cochran, a citizen of the state of Nebraska, to recover the possession of 20 acres of land situated in the suburbs of the city of Omaha, and described as the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 4, township 15 N., range 13 E., in Douglas county, Neb.

In pursuance of the practice in that state, under which two trials in ejectment are necessary to a final determination of a question of title, a trial was had before a judge, without a jury, and a judgment was entered in favor of the defendant. This judgment was forthwith, on motion of the plaintiff, set aside, and a new trial was awarded.

At this trial the record discloses that the plaintiff sustained his side of the issue by putting in evidence a chain of title from the United States to himself, consisting of a patent of the United States to Alexander R. McCandlers, dated March 13, 1861, for a tract of land, including the piece in dispute; a deed of Alexander R. McCandlers to Michael Thompson, dated May 2, 1861, for the same tract; a deed of Michael Thompson and wife to Edward B. Taylor, dated July 5, 1862, for said tract; a mortgage of Edward B. Taylor, to Ward, the plaintiff, dated July 28, 1871, on the 20-acre tract in controversy, to secure the payment of certain promissory notes; the record of proceedings in suit by Ward, the plaintiff, against the heirs and legal representatives of Edward B. Taylor, who had died in 1872, to foreclose said mortgage, and a sheriff's deed, under decree in said suit, to Ward, the plaintiff, dated July 11, 1877; a deed of Edward A. Taylor (son and

* For discussion of principles, see *Burdick*, Real Prop. §§ 229-232.

one of the heirs of Edward B. Taylor, and the only heir who had not been made a party to the foreclosure suit) to Ward, the plaintiff, dated June 25, 1885, for the 20-acre tract in dispute. It was admitted that the value of the land was \$20,000 at the time of the bringing of the suit.

The defendant adduced evidence tending to show that one John Flanagan had entered on the tract in dispute in 1868, under a parol sale of said tract to him by Edward B. Taylor; that Flanagan had continued in possession of the tract until 1885, when, on November 25th of that year, Flanagan and wife conveyed the tract to the defendant by deed of that date, who entered into possession.

On December 9, 1889, the jury rendered a special verdict, in the following words and figures:

"We, the jury impaneled and sworn to try the issues joined in the above-entitled cause, do find and say that one John Flanagan, in the year 1868, entered into the possession of the west one-half of the northeast quarter of the southwest quarter of section 4, in township 15 north, of range 13th east of the 6th principal meridian, in Douglas county, Nebraska, being the land in controversy in this case, under a claim of ownership thereto, and that he remained in the open, continued, notorious, and adverse possession thereof for the period of sixteen (16) years thereafter, and until he sold and transferred the same to the defendant in this case.

"We further find that said John Flanagan and Julia, his wife, by good and lawful deed of conveyance, conveyed said premises to the defendant in this suit in 1885, and surrendered his possession to this defendant, and that said defendant has remained in the open, continuous, notorious, and adverse possession of the same under claim of ownership down to the present time. We therefore find that at the commencement of this suit the defendant was the owner of and entitled to the possession of the said premises, and upon the issues joined in this case we find for said defendant."

On December 9, 1887, the plaintiff, by his counsel, moved for a new trial for reasons filed, and on the same day moved the court for judgment in his behalf notwithstanding the verdict.

On December 5, 1889, the motion for a new trial was overruled, and judgment was entered in favor of the defendant in pursuance of the verdict; and to said judgment a writ of error to this court was sued out and allowed.

Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court. * * *

This was an action of ejectment for the recovery of a tract of land of which the boundaries and situation were not matters of dispute. It was conceded that both parties claimed to derive title from one E. B. Taylor, and that the plaintiff's evidence sufficed to entitle him to re-

• Part of the opinion is omitted.

cover, unless such right of recovery was overcome by the defendant's claim of an adverse possession of a character and duration sufficient, under the laws of Nebraska, to create a good title.

The record discloses that the judge instructed the jury to make a finding of special facts, that the jury did so, that the plaintiff moved for judgment in his favor upon the verdict, that the defendant did likewise, and that the court sustained the defendant's motion, and entered judgment in his favor.

The following are the statutory provisions of Nebraska relating to verdicts:

"Sec. 292. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them, and they must be so presented as that nothing remains to the court but to draw from them conclusions of law.

"Sec. 293. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered on the journal.

"Sec. 294. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly."

Comp. St. Neb. 1887.

The action of the court below in rendering judgment on the special verdict in favor of the defendant forms the subject of the first assignment of error. The plaintiff's contention is that the special verdict did not warrant a judgment in favor of the defendant, because it did not find that the possession on which the defendant relied was actual and exclusive.

No state statute has been referred to as regulating or defining title by adverse possession, and, indeed, it is stated in the brief of defendant in error that there is no such statute; but there is a statutory provision that an action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within 10 years after the cause of such action shall have accrued.

Our investigation, therefore, into the sufficiency of the special verdict, must be controlled by the principles established, in this branch of the law, by the decisions of the courts, particularly those of the supreme court of the state of Nebraska and of this court.

In *French v. Pearce*, 8 Conn. 440, 21 Am. Dec. 680, it was said that "it is the fact of exclusive occupancy, using and enjoying the land as

his own, in hostility to the true owner, for the full statutory period, which enables the occupant to acquire an absolute right to the land."

In *Sparrow v. Hovey*, 44 Mich. 63, 6 N. W. 93, a refusal of the court to charge that, when the title is claimed by an adverse possession, it should appear that the possession had been "actual, continued, visible, notorious, distinct, and hostile," but merely charging the jury that the possession "must be actual, continued, and visible," was held erroneous. In Pennsylvania it has been repeatedly held that, to give a title under the statute of limitations, the possession must be "actual, visible, exclusive, notorious, and uninterrupted." *Johnston v. Irwin*, 3 Serg. & R. 291; *Mercer v. Watson*, 1 Watts, 338; *Overfield v. Christie*, 7 Serg. & R. 173.

In *Jackson v. Berner*, 48 Ill. 203, it was held that an adverse possession sufficient to defeat the legal title, where there is no paper title, must be hostile in its inception, and is not to be made out by inference, but by clear and positive proof; and, further, that the possession must be such as to show clearly that the party claims the land as his own, openly and exclusively.

In *Foulke v. Bond*, 41 N. J. Law, 527, it was said: "The principles on which the doctrine of title by adverse possession rests are well settled. The possession must be actual and exclusive, adverse and hostile, visible and notorious, continued and uninterrupted."

It was held in *Cook v. Babcock*, 11 Cush. (Mass.) 208, that, "when a party claims by a disseisin ripened into a good title by the lapse of time as against the legal owner, he must show actual, open, exclusive, and adverse possession of the land. All these elements are essential to be proved, and failure to establish any one of them is fatal to the validity of the claim."

In *Armstrong v. Morrill*, 14 Wall. 120, 20 L. Ed. 765, this court, speaking through Mr. Justice Clifford said: "It is well-settled law that the possession, in order that it may bar the recovery, must be continuous and uninterrupted, as well as open, notorious, actual, exclusive, and adverse. Such a possession, it is conceded, if continued without interruption for the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee, and bars the right of recovery. Independently of positive statute law, such a possession affords a presumption that the claimants to the land acquiesce in the claim so evidenced." *Hogan v. Kurtz*, 94 U. S. 773, 24 L. Ed. 317, is to the same effect.

The authorities in Nebraska are substantially to the same effect on questions of title by adverse possession.

A leading case is *Horbach v. Miller*, 4 Neb. 31, in which it was said that "the elements of all title are possession, the right of possession, and the right of property; hence if the adverse occupant has maintained an exclusive adverse possession for the full extent of the statutory limit, the statute then vests him with the right of property, which

carries with it the right of possession, and therefore the title becomes complete in him. * * * The submission of the case to the jury correctly was that if they believed from the evidence that the plaintiff in error, for ten years next before the commencement of the action, was in the actual, continued, and notorious possession of the land in controversy, claiming the same as his own against all persons, they must find for the plaintiff in error." In *Gatling v. Lane*, 17 Neb. 77, 22 N. W. 227, the language used was: "A person who enters upon the land of another with the intention of occupying the same as his own, and carries that intention into effect by open, notorious, exclusive, adverse possession for ten years, thereby disseises the owner." In *Parker v. Starr*, 21 Neb. 680, 33 N. W. 424, a recovery was sustained where the testimony clearly showed that "the defendant and those under whom he claims have been in the open, notorious, and exclusive possession for ten years next before the suit was brought." In *Ballard v. Hansen*, 33 Neb. 861, 51 N. W. 295, the following instructions, which had been given in the trial court, were approved by the supreme court: "The jury are instructed that adverse possession, as relied upon by the plaintiffs in this action, is the open, actual, exclusive, notorious, and hostile occupancy of the land and claim of right, with the intention to hold it as against the true owner and all other parties. Such occupancy, if continuous for ten years, ripens into a perfect title, after which it is immaterial whether the possession be continued or not." "If you find, from a preponderance of the testimony in this case, that the plaintiff was in the actual, open, notorious, exclusive, continuous possession of any of the lots in controversy for ten years, claiming to own and hold them as against all others, as to such lots he is entitled to recover."

Tested by these definitions, it is obvious that if the title relied on in this case by the defendant below was fully described and characterized by the special verdict, it was defective in two very essential particulars in that it was not found to have been actual and exclusive. A possession not actual, but constructive; not exclusive, but in participation with the owner or others,—falls very far short of that kind of adverse possession which deprives the true owner of his title.

Where a special verdict is rendered, all the facts essential to entitle a party to a judgment must be found, and a judgment rendered on a special verdict failing to find all the essential facts is erroneous.

In *Prentice v. Zane's Adm'r*, 8 How. 470, 12 L. Ed. 1160, it was said: "In *Insurance Co. v. Stark*, 6 Cranch, 268 [3 L. Ed. 220], and *Barnes v. Williams*, 11 Wheat. 415 [6 L. Ed. 508], this court has decided that where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below, with directions to award a venire de novo."

In *Hodges v. Easton*, 106 U. S. 408, 1 Sup. Ct. 307, 27 L. Ed. 169, where it was contended that an imperfect special verdict might be pieced out, and the missing facts be supplied by reference to the other parts of the record, the same conclusion was reached, and the court below was directed to award a new trial.

In the present case, even if the verdict were regarded as a general one, and therefore entitled to be supported by the presumption that sufficient facts existed to sustain it, yet we should feel constrained to reverse the judgment, because of the errors complained of in the 8th, 9th, and 10th assignments.

The plaintiff's counsel requested the court to charge the jury that, in order that possession of land may overcome the title of the true owner, "there must be a concurrence of the following elements: Such possession must be actual, hostile, exclusive, open, notorious, and continuous for the whole period of ten years. Every element in this enumeration is absolutely essential, and, if one of these elements does not exist, there can be no adverse title acquired,"—and the court did so charge; but the court then proceeded to say that, after having disposed of the written instructions, "I propose to go outside of what is there stated, and give one on my own motion." Those voluntary instructions given by the learned judge, though correct in most respects, were imperfect in the very particulars in which we have found the special verdict defective. The jury were not told that, to make out the defense, the possession, in addition to certain other features properly specified, must be shown to have been actual and exclusive. This clearly appears in the final instruction, which was in the following terms:

"But if you take the other view, and find that defendant has a good title, and that he is entitled to recover, then I think you ought to go further, and find the fact that he entered into the possession of the premises at a certain time, or as near as you can fix it from the testimony; that he occupied the premises; that he continued in possession for more than ten years prior to the commencement of this suit, which was December 4, 1886. You ought to find, if you can, from the testimony, about the time that he went into possession, whether he continued in possession, and whether his possession was adverse, continuous, and hostile prior to the commencement of this suit, or whether Flanagan and his grantees, defendants in this suit, continued in possession that long; it is the same as if Flanagan was in possession that long himself.

"If you find for the defendant, find when he took possession, if you can, and, as near as you can, how long he remained in possession before the commencement of this suit. Then your verdict will be, in addition to that 'We therefore find that at the commencement of this suit the defendant was the owner and entitled to the immediate possession of the premises in dispute.' That disposes of the whole controversy as far as the verdict of the jury is concerned."

Nor do we think that this is one of those cases in which erroneous or insufficient instructions in one part of a charge are corrected or supplied by unobjectionable instructions on the same questions, appearing in another part. It is evident that the attention of the jury must have been withdrawn from the instructions formally given, as requested, to those announced by the judge as given on his own motion, and it seems evident that this action of the court misguided the jury, and led them to overlook essential questions involved in the issue they were trying. *Smith v. Shoemaker*, 17 Wall. 630, 21 L. Ed. 717; *Moore v. Bank*, 104 U. S. 625, 26 L. Ed. 870; *Gilmer v. Higley*, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62; *Railroad Co. v. O'Brien*, 119 U. S. 103, 7 Sup. Ct. 118, 30 L. Ed. 299.

Whether, then, we regard the verdict as a special one, not containing findings sufficient to support the judgment, or as a general one rendered in pursuance of imperfect instructions, we reach the conclusion that the judgment of the court below must be reversed, and the cause remanded, with instructions to award a venire de novo.

AYERS v. REIDEL.

(Supreme Court of Wisconsin, 1893. 84 Wis. 276, 54 N. W. 588.)

Appeal from circuit court, Clark county; A. W. Newman, Judge.

Ejectment by Martin V. Ayers against John Reidel. Plaintiff had judgment, and defendant appeals. Affirmed.

The other facts fully appear in the following statement by PINNEY, J.:

Ejectment for a strip of land, "part of the southeast quarter of the northwest quarter of section number 10, on the east side thereof, about five rods wide at the north end and about two rods wide at the south end, about thirty rods long, and being all that portion of said forty-acre tract lying west of the east line thereof, and east of a fence claimed by defendant to be a line fence, but which is from two to five rods west of the true east line of said premises, and which fence runs north and south." The defendant is the owner of the northeast quarter of said section, the southwest quarter thereof lying directly east of the plaintiff's said 40-acre tract; and he claimed title to the strip in question under a continued adverse possession for more than 20 years before the commencement of the action, during which he claimed to have occupied it under claim of title thereto. The plaintiff purchased his 40-acre tract in the fall of 1875, and it was in the main woodland, and was and has since been used for pasturage purposes. He resided on a 40-acre tract immediately south of it, and bought both tracts of one Brown, who had owned and occupied the premises for some years previously. At that time it was all forest there. When the defendant settled on his tract he commenced cul-

tivating on the west side of the southwest quarter of the northeast quarter, immediately east of the southeast quarter of the northwest quarter, owned by the plaintiff; the first year making an opening of about 5 acres, which was increased from time to time the whole length of the 40. The defendant built a log fence in 1867 on the line between the parties. It was not built very straight along the 40, but diverged at the north end about 10 rods to the west. It was not made all at once, but from time to time, as the clearing was opened. It appeared that it was a forest country, just being settled, and the land was somewhat uneven; that no survey had been made of the lands on this section since the public survey, until 1889, when it was surveyed at the request and in the interest of the owners of the lands on said section, all contributed to the expense. It then appeared that a strip of the land so opened and cleared by defendant, varying in width from 1 to 8 or 10 rods, was found to be on the lands of the plaintiff, and it has been opened and cultivated by the defendant, and used and occupied by him for a period of about 23 years before the action was commenced.

About the time the plaintiff purchased his 40 in question, the log fence was destroyed by fire, and the defendant built a rail fence extending across the whole 40 from north to south, the plaintiff furnishing some trees to make rails of. The plaintiff and defendant talked about building that fence, and the defendant said it was on the line. Plaintiff supposed that he built it for a line fence. In respect to this the plaintiff testified, in substance, "that the defendant said it was the line, and that he said he did not know anything about it. The land had never been surveyed until 1889, when it was surveyed by one Stockwell. That they never had any idea where the land was until it was so surveyed. That he did not believe the claim of the defendant as to its being the line. That he made no objections to the fence being built, but that they talked time and again about having it surveyed, to know where the line was;" but this was denied by defendant. The defendant claimed he had a starting point on the road where the quarter post was, and that a surveyor, named Reddan, about 16 or 18 years before the suit was commenced, made a survey of an east and west line, through the center of the section, for highway purposes, and put up a post, which it is said he stated was the center of the section, but it did not appear that he made any completed survey of any tract on the section, and did not run any line north and south between the plaintiff's and defendant's lands. The rail fence was not on a straight line, but turned to the westward in like manner as the log fence, and was further to the west than the log fence was. It was not continuous, but for a space of some 80 feet there was nothing except a pile of stone, 6 or 8 feet wide, in lieu of the fence. This fence was not straight, but was irregular. The plaintiff's 40 acres to the south had been cleared over across the

line to the east about the same distance relatively that the defendant had cleared and fenced over on plaintiff's 40. It appeared that when Stockwell made his survey he succeeded in finding the quarter section stakes on each side of the section. There was no testimony to show what, if anything, had occurred between the defendant and Bowman, plaintiff's grantor, in regard to the premises, or whether he was aware that the defendant had cleared over the line. The defendant testified that "Bowman came to his house, and he went to Bowman's, and he did not say anything; never made any complaint in regard to the fence not being on the line." The rail fence was built in 1876. The defendant further testified that "during all the twenty-two years of his occupancy he supposed the land was his that he was cultivating and improving, and that no one ever claimed different until the trouble with Mr. Ayers, after the survey; that he believed in good faith that the strip in question was on his land; that he helped to pay for the Stockwell survey; that he claimed the land by virtue of his patent,"—and, being asked if he intended to claim any land except what was described in it, answered, "No; all that is mine." There was a conflict of testimony as to the width of the disputed strip.

After the Stockwell survey was made, in 1889, the plaintiff built a wire fence on the south half of the line between him and defendant, and the defendant in like manner built a wire fence, about 10 rods in length, on the north end of the north half of the line. Before building the wire fences the defendant proposed to plaintiff that they should build a good fence; that they had better put up a good fence,—to which he responded, "I will build just as good a fence as you will." He thought a five-wire fence would be sufficient, and we would not have any trouble with the cattle." The strip in dispute lies between said portions of wire fence, and is about 30 rods in length; and there is the same fence on the west side of it that was built in the spring of 1876, but in a dilapidated condition. The parties had an angry controversy with regard to the cutting of some grass by plaintiff on the strip in question in the year 1889, after the survey, and a somewhat irritating lawsuit concerning it.

The defendant, at the close of the plaintiff's testimony, moved for a nonsuit, on the ground that the plaintiff had not established any title; that the strip of land claimed was not described with sufficient certainty; that the fence built 15 years before was built by agreement between the parties, and they had practically settled where the line was, outside of any question as to adverse possession under the statute of limitations. But the court overruled the motion, holding that the question of agreement as to location of the fence was for the jury.

The court charged the jury that the plaintiff was entitled to recover the controverted strip of land, unless the defendant had succeeded in

establishing his defense; "that the evidence established, without contradiction, the line surveyed by Stockwell to be the true line."

As to the question of location of the fence, and building it by agreement, the court charged "that the defendant did not claim any positive agreement, but that the plaintiff had acquiesced in his location of the line for a long number of years, and that the question was whether the evidence sustained the position that the plaintiff acquiesced for a long number of years in the establishment of the boundary line, or whether he objected to it, and insisted upon the establishment of it by a surveyor; that, if he did rely and acquiesce in this location for fifteen years, then he ought to be bound by it; and that, if the evidence did not satisfy them that he had acquiesced during all these years, then the jury would not give the effect of an agreement to that evidence."

As to the defense of the statute of limitations the court said: "In order that it should give him a title, it must be true that he had been holding the land, for twenty years or more, adversely to the adjoining proprietor; and that depends in a measure upon what he thought in his own mind about it, and presents the question, what did he intend when he built that fence there? Did he intend to claim up to that fence absolutely, or did he intend that as a provisional line, to be verified thereafter when a surveyor found it, and to conform his line to that? If he intended to make his title absolute to the line, his possession would be adverse. If he intended it only as provisional until the true line was definitely ascertained, or could be in the future, then his possession was not adverse. You are to determine from all the circumstances, and from all that has been shown in evidence, what his idea was at the time when he first entered upon this land and built this fence. He must have had the purpose to acquire the title to the land adversely as against the adjoining owner during at least twenty years, and it would make no difference, if he did not enter upon it with this intention, that he changed his mind afterwards, unless, after he had changed his mind, and determined to hold adversely, he then held adversely the full twenty years. So that is all the question,—whether it was adverse. That depends upon the defendant's purpose, what the law calls the 'quo animo,' with which he entered,—whether it was to hold it adversely, or whether it was merely tentative or provisional, depending upon where the true line should be afterwards ascertained to be; that the burden of proof was on the defendant to satisfy the jury that this line was located by agreement, as explained, or the defendant has held the land for full twenty years adversely."

Plaintiff had a verdict for the strip claimed; and a motion for a new trial on the ground that the verdict was against the evidence and contrary to law, and for error of the court in its charge to the jury,

was denied, and from the judgment entered on the verdict the defendant appealed.

PINNEY, J., (after stating the facts.) 1. The circuit court properly ruled that the evidence established the line surveyed by Stockwell as the true line between the parties. The only objection urged is that there was evidence before the jury of what is called the "Reddan Survey," which was materially different from the line as determined by Stockwell. All the evidence concerning the Reddan survey was hearsay, and it does not appear that any record or plat was made of it, and he was not called to prove it, or to show how or in what manner he determined, if at all, the center of the section. He did not make any survey of the line in dispute, nor does it appear that he made a survey of any tract in the section, but whatever he did was in relation to surveying a road for the town.

2. It is contended that the court erred in refusing to direct a verdict for the defendant—First, on the ground that the undisputed evidence showed that the defendant had held continuous and adverse possession of the premises under claim of title for more than 20 years before the commencement of the action; and, second, that it conclusively appeared that the boundary line in question had been settled by acquiescence more than 15 years before the action was brought. What constitutes adverse possession is for the court to determine, but the facts which establish it are for the jury, and the question of the character of the possession is generally submitted to them. *Gross v. Welwood*, 90 N. Y. 638. It was for the jury to say what was the real character of the defendant's possession of the strip in dispute, and whether it was taken and maintained with an intention by the defendant to oust the true owner,—whether it was adverse to him in fact. To constitute adverse possession there must be the fact of possession and the hostile intention,—the intention to usurp possession; and, if there be possession of land by one not the true owner, the presumption of law is that such possession is in accord or amity with, and in subservience to, the true title and legal possession of the owner. *Dhein v. Beuscher*, 83 Wis. 316, 53 N. W. 554; *Schwallback v. Railway Co.*, 69 Wis. 298, 34 N. W. 128, 2 Am. St. Rep. 740; *Hacker v. Horlemus*, 74 Wis. 21, 41 N. W. 965; *Harvey v. Tyler*, 2 Wall. 349, 17 L. Ed. 871. The whole inquiry is reduced to the fact of entering, and the intention to usurp possession. *Probst v. Trustees*, 129 U. S. 191, 192, 9 Sup. Ct. 263, 32 L. Ed. 642. Permissive possession is never a basis for the statute of limitations, and the rule is that evidence of adverse possession must be strictly construed, and every presumption is in favor of the true owner, and that the defendant entered under his conveyance, and that his possession is only coextensive with his title, and restricted to the premises granted by it. *Sydnor v. Palmer*, 29 Wis. 252; *Graeven v. Dieves*, 68

Wis. 317, 31 N. W. 914; *Fairfield v. Barrette*, 73 Wis. 468, 41 N. W. 624.

The instructions of the circuit court on the question of adverse possession were as favorable to the defendant as the law would justify, and the jury were properly instructed that, "whether the defendant's possession was adverse depended upon the *quo animo* with which he entered upon the land; whether it was to hold it adversely, or whether it was merely tentative or provisional, depending upon where the true line should be afterwards ascertained to be." Whether the entry of defendant, and his continued possession, were an ouster of the plaintiff and his grantor, or were merely in subordination to the plaintiff, or permissive, was a question of fact for the jury. *Hacker v. Horlemus*, 74 Wis. 25, 41 N. W. 965. It is to be remembered that the facts relied on by the defendant to make out an adverse possession are in a great degree equivocal, owing to the condition of the country, and the entire want of any information in relation to the location of the center of section 10, and of the true line between the tracts in question; and there is no claim of any knowledge until the survey of the road by Reddan, which was much less than 20 years before this action was commenced; and there is an entire absence of testimony tending to show that the defendant's possession of the strip was in fact adverse to Brown, the plaintiff's grantor, who conveyed to the latter about 15 years before the suit. There was testimony also that the plaintiff and defendant had often talked of having a survey made, to ascertain where the line was; but this was denied by the defendant. Such survey was in fact made in 1889, and it appears to have proceeded upon unquestioned data, and the defendant acquiesced in it so far as to build 10 rods of fence on the north part of the line at a point where his cultivation of the strip on plaintiff's land was widest, and he suffered the plaintiff, without objection, so far as appears, to build a new fence for 40 rods on the south end of the line established by the survey. But for the irritation and temper growing out of a petty suit about some grass cut on this strip in the summer of 1890, it is possible, and perhaps probable, the surveyed line would have been acquiesced in as final.

While it is true that, if the defendant had acquired title to the strip in question by adverse possession prior to the survey in 1889, he would not have lost it by any of his subsequent parol declarations or acts, yet his acts in conforming to or acquiescing in that survey were competent evidence upon the intent with which he had occupied, and as tending to show that his possession had been provisional or permissive, and not adverse. The jury, in view of all the facts and circumstances, might well say that the old fence was not intended as a permanent boundary, but was built and maintained as a matter of convenience until the true line should be ascertained, and that the defendant's possession of the strip in question had not been adverse

for 20 years before the suit was commenced. While possession, occupation, and improvements for several years, with the knowledge of the true owner, may be prima facie evidence of adverse possession, yet they are not conclusive, and may be explained and rebutted by proof of facts showing that the possession was not in fact adverse, (*Worcester v. Lord*, 56 Me. 265, 96 Am. Dec. 456; *Dow v. McKenney*, 64 Me. 138; *Lamb v. Coe*, 15 Wend. [N. Y.] 642;) that it was permissive or provisional, and without the intention in fact of claiming or acquiring title.

There is no room for contending that there was any express agreement between the parties whereby the old rail fence was built for and was to be a boundary between the estates. The most that can fairly be claimed is that what occurred in view of the lapse of time tended to show as an inference that there was such agreement, and that the fence had become a settled boundary by acquiescence. This question, like that of adverse possession, was one of fact for the jury, and it was left to them under instructions free from objection. The verdict of the jury is supported by the evidence. There is no preponderance of evidence against it, and the motion for a new trial was properly denied.

3. It is objected that the description of the land in the complaint is fatally uncertain and defective. The description that it is "all of the described forty lying west of the east line thereof, and east of a fence from two to five rods west of the true east line, and which fence runs north and south," is sufficient. It is sufficient if, by the aid of a competent surveyor, and persons knowing the monuments or objects mentioned as boundaries, the lands can be found; and this is in accordance with *Orton v. Noonan*, 18 Wis. 447.

It follows that the judgment of the circuit court must be affirmed. The judgment of the circuit court is affirmed.

ILLINOIS CENT. R. CO. v. HOUGHTON.

(Supreme Court of Illinois, 1888. 126 Ill. 233, 18 N. E. 301, 1 L. R. A. 213, 9 Am. St. Rep. 581.)

Appeal from circuit court, McLean county; Owen T. Reeves, Judge. BAILEY, J. This was an action of ejectment, brought by the Illinois Central Railroad Company against Stephen Houghton and James Houghton, to recover two strips of land, each 50 feet in width, the one 70 and the other 80 rods in length, being a part of section 22, township 23 N., of range 2 E., in McLean county, and adjoining, the one on the east and the other on the west, the strip of land 100 feet in width heretofore occupied by the plaintiff as its right of way. The trial, which was had before the court without a jury, resulted in a finding and judgment in favor of the defendants, and the plaintiff brings the record to this court by appeal.

On the 29th day of April, 1852, as seems to be conceded, William Walker was the owner in fee of the 80-acre tract which includes the two tracts in controversy. The plaintiff's proof of title consists of a deed executed by said Walker and wife, dated April 29, 1852, conveying to the plaintiff "for the purpose of constructing, maintaining, and operating thereon a single or double track railroad, with all its necessary appurtenances, and for all uses and purposes connected with the construction, repair, maintenance, and complete operation of said railroad, the right of way over and through said tract," said right of way to comprise land of the width of 100 feet on each side of said railroad; to have and to hold the same to the plaintiff and its successors and assigns forever "for all lawful uses and purposes incident to a full and indefeasible title in fee-simple, or in any way connected with the construction, preservation, occupation, and sole enjoyment of said road and lands, of the width aforesaid." The deed also contained a covenant on the part of the plaintiff to erect and maintain such lawful fences as would divide the lands occupied by the plaintiff from the adjoining lands on each side, and as far as possible prevent intrusion upon or passage across the lands and railroad occupied by the plaintiff. It appears that the plaintiff, shortly after the execution of this deed, erected substantial post and board fences, so as to inclose its right of way of the width of only 100 feet, leaving the two strips of land now in controversy outside of its fences. Walker joined his farm fences with the fences inclosing the railroad, and occupied and used said two strips of land the same as he did the residue of his farm; and the evidence tends to show that he did so claiming to be the owner. Said land was partly under cultivation, partly in grass, and in part covered with timber, and Walker cut some of the timber and grazed and cultivated the land not covered with timber, and continued in possession of the land as a part of his farm until November 28, 1855, at which time he conveyed it to George and James Park; said conveyance being by its terms made "subject to the right of way of the Illinois Central Railroad Company, as heretofore deeded by said party of the first part to said railroad company."

George and James Park went into possession under said deed, and used the land the same as Walker had done. James Park died, and John E. Park, his sole heir at law, conveyed his interest in the farm to George Park, by deed dated March 18, 1869. George Park continued in possession until 1871 or 1872, when he died, leaving several heirs. On the 28th day of June, 1873, the administrator of George Park sold and conveyed that portion of the farm west of the railroad to Stephen Houghton in pursuance of an order of the county court of McLean county, and prior to making such sale the administrator had the land surveyed up to the railroad fence, and sold it all to Houghton by the acre. Houghton and his son James took immediate possession of the land under said deed, and have ever since been in possession of the same, claiming to own it. They have also during the same time been

in possession of the strip of land on the east side of the railroad as tenants of the heirs of George Park, having rented that portion of the farm east of the railroad. The railroad fences remained where they were originally built from 1853 down to some time in the year 1886. On several occasions during that time, fire from the railroad engines burned down portions of said fences, and also destroyed the cross-fences and crops on the land in controversy, and the plaintiff on each occasion rebuilt the railroad fences, and paid the adjoining proprietors the damages done upon said lands. In 1886 the plaintiff took down said railroad fences, and erected new fences 50 feet further from its railroad track; thus entering and taking possession of the land in controversy. Stephen Houghton thereupon brought his action of forcible entry and detainer, and recovered possession of said land, and then the plaintiffs brought this suit.

By the declaration the plaintiff claims an estate in fee, and as the evidence tends only to establish the plaintiff's title to an easement in the premises sued for in the nature of a right of way, it is urged that no recovery could be had, upon the principle that where a plaintiff claims in fee he cannot recover a less estate. We do not deem it necessary to determine whether this rule applies, since there is another ground upon which the judgment must be affirmed, which seems to us to be entirely satisfactory. The fact is established beyond controversy that from the time the railroad fences were built down to the date of the plaintiff's entry in 1886, a period of about 33 years, the defendants and the grantors through whom they derived their title were in the actual, continuous, visible, open and exclusive possession of the land sued for; and it seems too clear for serious doubt that such possession was adverse to the plaintiff. The deed under which the plaintiff claims required the plaintiff to erect and maintain fences dividing its right of way from the adjoining lands, and it will be presumed that the fences were erected in pursuance of that requirement. Walker continued in possession up to the fences, claiming them as his boundary lines, and claiming to have established such lines by compromise with the plaintiff. The deed from Walker to George and James Park, it is true, was made subject to the plaintiff's right of way as deeded by Walker to the plaintiff, but they took and held possession precisely as Walker had done, up to the fences which Walker claimed as his boundary lines. Park's administrator sold the land on the west side of the railroad by metes and bounds, making the fence the boundary line, and since 1873 the defendants have been in possession of the lands on both sides of the railroad, claiming title up to the railroad fences.

To constitute an adverse possession sufficient to defeat the right of action of the party who has the legal title, the possession must be hostile in its inception, and so continued without interruption for the period of 20 years. It must be an actual, visible, and exclusive possession, acquired and retained under claim of title inconsistent with

that of the true owner. It need not, however, be under a rightful claim, nor even under a muniment of title. It is enough that a party takes possession of premises, claiming them as his own, and that he holds possession for the requisite length of time, with the continual assertion of ownership. *Turney v. Chamberlain*, 15 Ill. 271. It is not essential, however, that there should be proof that the party in possession made oral declarations of claim of title, but it is sufficient if the proof shows that he has so acted as to clearly indicate that he did claim title. No mere words could more satisfactorily assert a claim of title than a continued exercise of acts of ownership over the property for a period of more than 20 years. Using and controlling property as owner is the ordinary mode of asserting a claim of title, and it is indeed the only proof of which a claim of title to a very large proportion of property is susceptible. *James v. Railroad Co.*, 91 Ill. 554.

But it is insisted that the plaintiff's right of way, being a mere easement,—the fee remaining in Walker and his grantees, subject to the easement,—the possession of Walker and his grantees is to be regarded as being held under their title, and therefore not hostile to the plaintiff, so as to constitute it an adverse possession. To this view we are unable to yield our assent. If the right of way of a railroad company were an easement, the proper enjoyment of which was consistent with the possession and occupancy of the land by the owner of the fee, such possession and occupancy might be regarded as a mere exercise by the owner of the servient estate of his property rights, subject and in subordination to the easement. Such, however, is not the character of the easement which a railroad company acquires in the land covered by its right of way. As said in *Hazen v. Railroad Co.*, 2 Gray (Mass.) 574: "The right acquired by the corporation, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature, and practically exclusive." The same view was taken by the supreme court of Vermont in *Hurd v. Railroad Co.*, 25 Vt. 116, where, in discussing the interest obtained by a railroad company in its right of way by condemnation, the court say: "If that interest is regarded as a mere servitude or easement, the land nevertheless becomes so far the property of the corporation that their right is exclusive in its use and possession during its existence, as much so as that of the owner or occupant of the adjoining land. Those from whom the land was taken retain no right to its use or occupation for pasturage or otherwise. The object for which it is appropriated and used is wholly inconsistent with such right on the part of the former owner, as well as with that security to themselves and safety to the public which is necessary to enable the corporation to enjoy the franchises granted by their charter." In *Jackson v. Railroad Co.*, 25 Vt. 150, 60 Am. Dec. 246, the same court, speaking through Mr. Chief Justice Redfield, says: "The railway company must, from the very nature of their operations, in order to the security of their passengers and workmen, and the enjoyment of the road, have the right at all

times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners in any mode, and for any purpose." *Railroad Co. v. Potter*, 42 Vt. 265, 1 Am. Rep. 325; *Railway Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190.

In *Railroad Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112, this court held that the right of way was the exclusive property of the railroad company, upon which no unauthorized person had a right to be for any purpose; and in the opinion of this court in *Railroad Co. v. Patchin*, 16 Ill. 198, 61 Am. Dec. 65, it is said: "I presume the right to the land upon which railroads are built is not strictly analogous to the easement of the public in highways, leaving the fee in the owner of the soil, but is an absolute ownership in fee for railroad purposes." While we are not disposed to hold that the deed from Walker to the plaintiff conveyed to the plaintiff an estate in fee in the right of way, it is clear that in conveying an estate which, so far as the right of possession for railroad purposes is concerned, had most of the qualities of the fee. The right of possession thereby conveyed was exclusive, and was wholly inconsistent with the subsequent possession of the land or any part of it by the grantor or his assigns for the purposes of grazing or agriculture, or as a part of the farm to which it originally belonged. The possession of Walker and his assigns, being wholly inconsistent with the plaintiff's title, and having been held under a claim of title on their part, has been hostile, and has constituted an adverse possession; and, such possession having been continued for more than 20 years, the plaintiff's right to bring its action for the recovery of said lands is barred by the statute.

The finding of the court was therefore in accordance with the evidence, and the judgment must be affirmed.

GORDON v. SIMMONS.

(Court of Appeals of Kentucky, 1910. 136 Ky. 273, 124 S. W. 306, Ann. Cas. 1912A, 306.)

Appeal from Circuit Court, Trigg County.

"To be officially reported."

Action by Bettie Gordon and others against W. F. Simmons. Judgment for defendant. Plaintiffs appeal. Reversed and remanded for new trial.

SETTLE, J. The appellant Bettie Gordon, widow, and others, heirs at law of A. J. Gordon, deceased, brought suit in the court below to recover of the appellee, W. J. Simmons, a parcel of land described in the petition, which they claim to own and allege to be wrongfully in appellee's possession; also to recover of the latter damages for its unlawful detention and use.

It appears from the record that A. J. Gordon became the owner in 1894 of a 100-acre tract of land known as the "House survey." In-

cluded within the lines of the House survey, though not a part thereof, was a 50-acre tract known as the "Turner Mashburn or Boren survey." Appellants live, as did A. J. Gordon at the time of his death, upon the House 100-acre survey. Appellee owns and is in possession of the 50-acre Turner Mashburn or Boren survey. The land appellants seek to recover consists of about 20 acres of the House survey alleged to be wrongfully held by appellee.

It is alleged in the petition that a controversy arose between appellants and the appellee, Simmons, shortly before the institution of the action as to the location of the lines of their respective lands, in which controversy appellee was setting up claim to the 20 acres of the House survey in question by virtue of an alleged exchange thereof by A. J. Gordon, deceased, with appellee's remote vendor, Boren, for 14 acres of the Turner Mashburn 50-acre survey, and also to the 14 acres last mentioned as well, and that, in order to settle the controversy without suit, appellants and appellee entered into a written agreement, whereby appellants released to appellee all that part or parcel of land known as the Turner Mashburn survey, in consideration of which appellee obligated himself to release and surrender to appellants all that part of the House survey claimed by him, the original line of both the House and Turner Mashburn surveys to be ascertained by a survey to be made by the surveyor of Trigg county, each party to pay one-half the costs of such survey; that, pursuant to this agreement, the lines of the House and Turner Mashburn surveys were run and established by the surveyor of Trigg county as claimed by appellants, but that, notwithstanding such agreement and settlement of the controversy between the parties, appellee, in violation thereof, took possession of the 20 acres of the House survey which he had agreed to surrender to appellants, and proceeded to cultivate same.

Appellee by answer attempted to justify his holding of the 20 acres of the House land upon the ground that his remote vendor, Boren, while owner of the 50-acre tract of land, made a verbal swap or exchange of 14 acres thereof to A. J. Gordon, then owner of the House 100-acre tract, for the 20 acres of the latter tract in controversy, and that, pursuant to such exchange, Boren and Gardner established an agreed line between the lands exchanged, and each surrendered to the other, without executing deeds therefor, the land received in the exchange. It was further alleged in the answer that appellee and his vendors immediate and remote have had and held the actual adverse possession of the 20 acres received by Boren in the exchange with Gordon for more than fifteen years before the institution of appellants' action, which it was claimed entitled appellee to rely upon the statute of limitations in bar of the action; the statute being duly pleaded. It was further alleged in appellee's answer that he signed and acknowledged the writing referred to without

knowledge of its contents and by the fraud and procurement of the appellant Bettie Gordon and her agent, A. S. Ford.

Appellants by reply controverted the affirmative matter of the answer. The trial resulted in a verdict and judgment in appellee's favor, and appellants, having been refused a new trial by the circuit court, prosecute this appeal.

It appears from the evidence found in the record, and is conceded by the parties, that when appellee's remote vendor, Boren, owned the 50-acre Turner Mashburn land, he and A. J. Gordon attempted a verbal exchange of lands; that is, Boren agreed to exchange with Gordon, then owner of the 100-acre House survey, 14 acres of the Turner Mashburn land for 20 acres of the House land, and that Boren and Gordon at the time marked a dividing line across the Turner Mashburn land from the south to the north boundary of the House tract on either side of the Turner Mashburn land, which left the 14 acres received by Gordon in the exchange east of the division line, and the 20 acres received by Boren west of that line. The evidence is not definite as to when or to what extent either Gordon or Boren asserted possession over the land received by him in the exchange. It is clear, however, that neither made a deed to the other, but apparent that appellants were willing after appellee acquired the Turner Mashburn or Boren land to let the exchange as made by A. J. Gordon and appellee stand. With this, however, appellee according to the evidence did not appear satisfied, for he set up claim to the 14 acres received by Gordon in the exchange as well as the 20 acres thereby received by Boren. This state of case raised the controversy between appellee and appellants resulting in the written agreement whereby the previous exchange of lands between A. J. Gordon and Boren was ignored, and the parties obligated themselves that appellants should hold the House land of 100 acres according to the lines thereof to be established by the county surveyor, and appellee the Turner Mashburn 50-acre tract according to its boundary as established by the surveyor.

We fail to find from the record that appellee proved possession on the part of himself or vendors of the land in controversy for as much as 15 years before the institution of appellants' action. He did, it is true, prove by two or three witnesses that the exchange of lands between A. J. Gordon and Boren was made and a line dividing the lands exchanged, marked, and established 25 or more years ago; but these witnesses were evidently mistaken as to the date of the exchange and making of the line, for it was alleged in the petition, and not denied by the answer, that A. J. Gordon did not become the owner of the House 100-acre tract of land until December 17, 1894, and, as the deed conveying him the land bears that date, it, with the undenied averment of the petition, conclusively established the fact. This being true, as is the further fact that appellants' action was instituted

by the filing of the petition and issual of a summons November 6, 1907, it necessarily follows that A. J. Gordon did not own the House land as far back as the two witnesses referred to testified he exchanged lands with Boren. Indeed, to be precise, it is certain that Gordon and his widow and children, following his death, had owned the House land only 12 years, 10 months, and 19 days, when this action was instituted. It is therefore patent that appellee and his vendors could not have had actual, adverse, or even constructive possession of the 20 acres of land in controversy by virtue of an exchange of lands between Boren and Gordon for as much as 15 years before the institution of appellants' action to recover it.

An oral agreement fixing a dividing line between the adjoining lands of antagonistic parties has by this court been held not within the statute of frauds and perjuries; it being the policy of the courts to approve and uphold such agreements as tending to discourage controversies between neighbors and prevent litigation. *Jamison v. Petit*, 6 Bush, 670; *Grigsby v. Combs*, 21 S. W. 37, 14 Ky. Law Rep. 652; *Campbell v. Campbell*, 64 S. W. 458, 23 Ky. Law Rep. 870; *Frazier, etc., v. Mineral Development Co.*, 86 S. W. 983, 27 Ky. Law Rep. 815. But an oral exchange of lands is within the statute, and can no more be enforced than can an oral or parol sale of land. It is true that cases may be found in which the courts have refused to disturb such exchange of lands; but it was only where possession was taken by the parties of the lands received respectively by the exchange and actually and adversely held for as much as 15 years. Appellee has shown no such possession. So, if the written agreement he made with appellants were out of the way, he would nevertheless be unable to hold the land in controversy by reason of the exchange between Gordon and Boren.

It is his contention that the writing was intended to set forth an agreement between himself and appellants to cause to be surveyed and ascertained the line dividing the lands exchanged by Gordon and Boren, and that he believed it expressed such agreement when he signed and acknowledged it, but that appellants' agent, Ford, fraudulently caused the writing to be prepared in its present form and language, and induced him to sign it without informing him of its contents or meaning. This contention is not sustained by appellee's own testimony. He did say it was not understood by him, but admitted that he had it in his hands, and was thereby given an opportunity to read it. He also failed to deny that it was read to him by Ford. The three attesting witnesses to the writing were Ford, Williams, and Simmons; the latter being a brother of appellee. Ford testified that the paper was written as directed by the parties; and he and Williams also testified that Ford placed the writing in appellee's hands before it was signed by him, and that the latter held it for some time. appeared to be reading it, and had ample time to do so: that Ford

received the paper after appellee had thus examined it, and then read and explained it to appellee, who thereupon expressed his satisfaction with the paper and signed and acknowledged it, following which it was duly recorded.

Simmons, the third attesting witness, substantially corroborates both Ford and Williams as to what occurred when appellee executed the writing, and two other witnesses to whom appellee talked after signing the writing testified as to statements from him manifesting his knowledge of its contents and satisfaction with its provisions. According to the survey made in pursuance of the written agreement, the lines of the House 100-acre tract are as claimed by appellants, and they include and show appellants to be the owners of the land in controversy; no evidence being offered by appellee to prove that it is not a part of the House tract.

Our reading of the record convinces us that the verdict of the jury was flagrantly against the evidence; indeed, unauthorized by it; and, in view of the evidence of appellants' right to the land in controversy and the absence of evidence to support appellee's defense, the trial court should have peremptorily instructed the jury to find for appellants as to the ownership of the land, no damage being shown on account of its detention or for injury to it.

This conclusion makes it unnecessary for us to consider the objections urged by appellants to the instructions that were given by the court, except to say that the instructions should not have been given. Only a peremptory instruction as indicated would have been proper.

Wherefore the judgment is reversed and cause remanded for a new trial consistent with the opinion.

VANDIVEER v. STICKNEY.

(Supreme Court of Alabama, 1883. 75 Ala. 225.)

Appeal from Montgomery Circuit Court. Tried before Hon. James E. Cobb.

This was a statutory real action in the nature of ejectment, brought by William P. Vandiveer against Henry G. Stickney and Mary E. Stickney; was commenced on 17th May, 1880; and, as to that portion of the land actually in controversy,—to which a disclaimer filed by the defendants did not apply,—the cause was tried on issues joined on the pleas of not guilty and the statute of limitations of ten years, the trial resulting in a verdict and judgment for the defendants.

The evidence introduced on behalf of the plaintiff tended to show that "the property sued for was the property of R. B. Owens at his death; that the said Owens died intestate, in the year 1862, leaving as his only heirs at law his children, William, Edwin, and Emma Owens, and Mrs. Stickney, the defendant; that said Emma died in March,

1869, unmarried, and without children"; that on 16th June, 1870, said Edwin and William Owens executed to the plaintiff a mortgage on an undivided two-thirds interest in the land described in the complaint, to secure money then loaned to them by the plaintiff; and that said debt had not been fully paid.

The evidence introduced on behalf of Mrs. Stickney tended to show that her sister Emma, at the time of her death, was about sixteen years of age; that prior to her death, she expressed a desire that Mrs. Stickney should have her interest in her father's estate, on account of her care for her, and on account of the money she had spent for her; that within a few days after the death of said Emma, Edwin and William Owens and Mrs. Stickney "met and discussed the matter between them and it was agreed between them that Mrs. Stickney should have said Emma's interest in said property"; that this agreement was verbal; that from the time of said agreement, Mrs. Stickney entered into the possession of said property "by herself, or her husband, as trustee, or tenants, claiming the entire property as her own in good faith, continuously, openly, notoriously, and adversely"; that she has continued "in such possession of the same by herself, husband or tenants, and was in such adverse possession at the time of the execution of said mortgage to the plaintiff, she, at that time, and ever afterwards, claiming the said property as her own, in good faith, openly, notoriously and adversely to her brothers and all the world"; that on 21st February, 1870, the said Edwin executed a deed, conveying to Mrs. Stickney his undivided interest in said property, which deed was duly recorded; that the said William "had conveyed to Mrs. Stickney his undivided one-fourth interest in his father's estate, of which he was possessed, before his sister Emma's death, and that the deed conveying said interest was duly executed, prior to the death of his sister Emma, and upon a valuable consideration; that the only right to said William's one-twelfth interest in said real estate, acquired through his said sister Emma, claimed by Mrs. Stickney was under and through said verbal agreement, and the adverse possession thereof as aforesaid"; and that after said verbal agreement, neither the said William nor the said Edwin ever asserted any right, title, claim, or interest in or to the share of the said Emma in said property.

"Plaintiff then introduced evidence tending to show that Edwin and William Owens were in possession of said stables and stable lot [a part of the property in controversy] in the spring of 1870, and at the time of the execution of said mortgage; and there was also evidence introduced by defendants, tending to show that the said William and Edwin Owens, while in possession as aforesaid, at the time of the execution of said mortgage, were there as the tenants, and employés of the defendants Stickney and wife, and in no other capacity. The said plaintiff also testified that he had no knowledge of the claim or title of Mrs. Stickney to the interest of her said brother William in said Emma's one-fourth of said property described in said mortgage."

The foregoing was the substance of the evidence introduced on the trial bearing on the question decided by the court. The plaintiff reserved numerous exceptions to charges given and refused, which the opinion does not render necessary to set out.

Those charges are here assigned as error.

SOMERVILLE, J. We discover no error in the rulings of the circuit court, as shown in the present record.

In *Collins v. Johnson*, 57 Ala. 304, it was decided that an uninterrupted, continuous possession of lands by a donee, under a mere parol gift, accompanied with a claim of right, is an adverse holding as against the donor, and will be protected by the statute of limitations, thus maturing into a good title by the lapse of ten years. The fact is immaterial that such a parol gift of lands conveys no title, and only operates as a mere tenancy at will, capable of revocation or disaffirmance by the donor at any time before the bar of the statute is complete. It is evidence of the beginning of an adverse possession by the donee, which can be repelled only by showing a subsequent recognition of the superiority of the title of the donor. The essence of adverse possession is the *quo animo* or intention with which the possession is taken and held by a defendant. It is, in the settled language of the books, the intention which "guides the entry, and fixes its character." *Angell on Lim.* § 386; *Ewing v. Burnet*, 11 Pet. 41, 9 L. Ed. 624. Even where the technical relation of landlord and tenant exists, and despite the settled rule that a tenant will not be permitted to dispute the title of his landlord, there is no principle of law or of public policy which forbids a tenant from holding adversely to the landlord, so as to acquire title of the demised premises under the operation of the statute of limitations. But in all such cases, the presumption in the first instance is, that the tenant's possession is permissive and in subordination to the title of the landlord, and there must be clear and positive proof of a disclaimer or renunciation of the superior title, brought home to the knowledge of the landlord with unquestionable certainty. *Angell on Lim.* § 444; 2 *Brick. Dig.* p. 200, §§ 101, 102.

The evidence tended to show that the defendants held adverse possession of the lands in suit for more than ten years prior to the commencement of the action. The undivided interest of Emma Owen, which on her death descended in part to her two brothers, William and Edwin, was released by parol to their other sister, Mrs. Stickney, who is one of the defendants. Her adverse possession commenced at this time, which was about the middle of March, 1869, and is shown to have continued, without any subsequent recognition of the title of her donors, until the commencement of this suit, in May, 1880. The mortgage executed by the two brothers to Vandiveer, the plaintiff, in June, 1870, did not change the adverse nature of Mrs. Stickney's possession, nor operate in any manner to stop the running of the statute.

This mortgage, moreover, is shown to have been executed by the mortgagors during the period of Mrs. Stickney's occupancy and adverse holding, the hostile character of which was not only known to them, but, in its inception, was expressly authorized by their parol release of the deceased sister's interest in the mortgaged lands. The mortgage was therefore void as tending to promote champerty and maintenance by traffic in litigated titles. 'The rule of law rendering conveyances of lands void, when held adversely, is, in part, one of public policy, designed to "throw obstacles in the way of asserting doubtful rights to the prejudice of occupants."' *Clay v. Wyatt*, 6 J. J. Marsh (Ky.) 583; *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52. "It seems," says Chancellor Kent, "to be the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor hath the capacity as well as the intention to deliver possession." 4 Kent, 448.

To avoid a conveyance on this ground, it is not requisite that such adverse possession should be asserted under any color of title, but only under claim of right. But it must be actual as distinguished from constructive possession. *Bernstein v. Humes*, 71 Ala. 260; *Eureka Co. v. Edwards*, Id. 248, 46 Am. Rep. 314. Nor is it required that the mortgagee, or other purchaser should have actual notice of such adverse holding, in order to vitiate the conveyance. The constructive notice implied from possession is sufficient. *Bernstein v. Humes*, supra.

Nor, yet again, does a knowledge by one in actual possession, claiming title, that his title is defective, avail to destroy its adverse character. The test is the actual claim, and not the bona fides of it, in all cases, at least, where the possession is actual and not merely constructive. *Smith v. Roberts*, 62 Ala. 83; *Alexander v. Wheeler*, 69 Ala. 332; *Gordon, Rankin & Co. v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813.

These principles are all pertinent to the present case, and were recognized in the rulings of the court.

The doctrine settled in this State is, that the possession of the tenant is the possession of the landlord, and notice of the former is notice of the latter. The reason is, as observed in a former decision, that an inquiry of the occupant will be likely to lead to a knowledge of the fact that he is a mere tenant, holding, not in his own right, but in the right of another who is his landlord. *Brunson v. Brooks*, 68 Ala. 248; *Pique v. Arendale*, 71 Ala. 91; *Wade on Notice*, §§ 284-286; *Burt v. Cassety*, 12 Ala. 734.

It was immaterial, therefore, that the mortgagors were in the temporary occupancy of a portion of the property sued for at the time of the execution of the mortgage, in the year 1870, provided they entered after the commencement of Mrs. Stickney's adverse possession, and as mere tenants, fully recognizing the superiority of her title as owner and landlord. Purchasers from tenants are as fully precluded as the tenants themselves, from disputing the title of their

landlord. *Taylor's Land. & Ten.* § 91; *Bishop v. Lalouette*, 67 Ala. 197. The principle settled in *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418, does not conflict with this view. There the possession of the vendor and purchaser was joint, both being in actual possession at the time the deed was executed. It was held that, in as much as there was no visible change of possession, a third person purchasing would not be charged with constructive notice of the unrecorded deed of the first vendee. If, however, the vendor had openly and visibly yielded exclusive possession to the vendee, and had afterwards gone in as a mere tenant, the rule would have been otherwise. Such is this case, in fact, as well as in principle and legal effect.

Judgment affirmed.

2. COLOR OF TITLE

ANDERSON v. BURNHAM.

(Supreme Court of Kansas, 1893. 52 Kan. 454, 34 Pac. 1056.)

Error from district court, Allen county; L. Stillwell, Judge.

Action by Nelson Burnham against Thomas Anderson to recover land. Plaintiff had judgment, and defendant brings error. Reversed.

JOHNSTON, J. This was an action brought by Nelson Burnham against Thomas Anderson to recover 160 acres of land in Allen county. To sustain his right of recovery, Burnham showed a patent from the United States to the Missouri, Kansas & Texas Railroad Company, dated November 3, 1873, and also a chain of title from the railroad company, through several conveyances, to himself. The patent and the instruments of conveyance were duly recorded in the office of the register of deeds. Anderson rests his claim of title upon adverse possession of himself and grantor for more than 15 years prior to the commencement of the action.

Upon the question of adverse possession, the only evidence produced was that offered by Anderson. It showed that Anderson purchased the land from C. O. Starkey in 1881, who then conveyed such interest or title as he had to Anderson by quitclaim deed. In 1866, while it was yet government land, and subject to entry by settlers, Starkey entered upon it with a purpose of procuring a title thereto under the laws of the United States relating to public lands. He then surveyed out the land, and placed posts or stakes at each corner of the quarter section, indicating the boundaries and extent of his claim. He broke or plowed a portion of it, which was cultivated and put in crops every year thereafter, until the land was sold to Anderson. Hedgerows were broken out, and in 1868 he built a hay barn and corncrib, which was a permanent structure and a visible evidence of occupancy. He used that portion of the land not in cultivation as a meadow, cutting

and putting up hay thereon each year of his occupancy. He was an unmarried man until 1879, and did not build a residence upon the property until that year, but from the time that he entered upon it, until the residence was built, he lived with his father upon an adjoining farm. At no time was his possession interrupted, and in the vicinity where it was located it was known and recognized as "Starkey's Claim." He plowed entirely around the quarter section 20 12-inch furrows, built a house and stable, planted 300 fruit trees, lariatied and herded his stock upon it, and remained in undisputed possession until it was sold and transferred to Anderson, in 1881. Anderson immediately took possession, fenced and cultivated all but 75 acres, which was put in a pasture, planted an additional orchard, built other buildings, and resided upon the farm continuously until the commencement of the action, which was August 6, 1889.

There was no pretense of possession by Burnham, nor by any of his grantors. On the other hand, it is shown that an agent of the railroad company, who was engaged in locating and appraising the lands granted to the company, had notice of Starkey's possession, as well as of the claim which he made to the land. It is clear from what has been stated that there has been an actual occupancy by Anderson and his grantor, clear, positive, notorious, and continuous, for more than 15 years before the commencement of the action. Did such occupancy constitute adverse possession, which ripened into a good title, as against the legal owner? Starkey could obtain no right against the United States by reason of his possession, but it appears that the title passed from the government in 1873, and there was a lapse of more than 16 years thereafter before the possession was challenged. During all that time Anderson and his grantor were claiming and holding in hostility to the rights of the railroad company and those holding under it. It is true that Starkey had no paper title, but this is not essential to adverse possession, nor to the acquirement of title by virtue of the statute of limitations. Our statute does not, as do those of some of the states, make color of title an essential element in a title by limitation. Civil Code, § 16. In *Wood v. Railway Co.*, 11 Kan. 324, it is said that "a mere trespasser, without color of right or title, who has been in the actual possession of real estate for fifteen years, claiming title thereto, becomes the owner of the property, by virtue of the statute of limitations, if the property has been owned during all that time by some individual or individuals, and not by the United States. Mere possession, therefore, of lands to which the government has parted with its title, for any period, however short, with a claim of ownership, may be said to be an incipient or inchoate title, for such a possession will in time ripen into a complete, perfect, and absolute title."

This doctrine was reasserted in *Rosa v. Railway Co.*, 18 Kan. 127. It is the holding of the notorious and exclusive possession of the land

in hostility to the rights of the owner which gives the title, and not any mere instrument or paper under which claim is made. Possession by any adverse occupant, which is actual, continuous, and exclusive, will give title when the bar of the statute becomes complete, although such possession is entirely destitute of color of title. The difference between title acquired by adverse occupancy under color of title and without such color is that under the former the color of title gives character to the possession, and gives rise to the presumption that the claimant intends the entry shall be coextensive with the description in the deed, while under the latter the title will only be coextensive with the actual, visible, and continued occupancy. *Gildehaus v. Whiting*, 39 Kan. 711, 18 Pac. 916; *Roots v. Beck*, 109 Ind. 472, 9 N. E. 698.

If the entry upon the land by Starkey was actual, and the holding of the possession was notorious and exclusive from 1873, when the railroad company acquired the legal title, it would amount to a disseisin, which would give title at the end of the statutory period. It is immaterial what may have been his right or claim of right to the land, and what may have been his motive, if he entered upon the land and held a hostile possession as against the owner of the legal title. *Fitzgerald v. Brewster*, 31 Neb. 51, 47 N. W. 475. It is true that Starkey did not reside on the land until 1879, but it is not necessary that a person should reside upon real estate in order that he may be in the actual possession of the same. If it is subjected to the dominion of the claimant, manifested in some appropriate manner, adapted to its character, condition, and locality, by which the party proclaims to the public that he asserts an exclusive control and ownership of the land, a residence upon it as not essential. *Gilmore v. Norton*, 10 Kan. 491; *Barstow v. Newman*, 34 Cal. 91; *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431.

In the early years of the occupancy of the land by Starkey, the country was new, sparsely settled, and not much of it was in actual cultivation, but this land, like that surrounding it, was largely used for hay and grazing purposes. It was not inclosed with a fence, but that is not essential to actual and adverse possession. The use which he made of it was that to which it was adapted, and the improvements which he placed thereon proclaimed to all that he was exercising rights of ownership over the land, inconsistent with the right of the real owner. The improvements marked the boundaries of the land, and left no question that he was claiming the entire quarter section. His occupancy and use were continuous from year to year, so that he could not be regarded as an occasional trespasser, nor can his possession be regarded as hidden or intermittent. For more than 15 years this possession was maintained without interference by the holder of the legal title, or any attempt by him to dispute the right-

fulness of the possession of Starkey and Anderson. During this long period of occupancy and possession valuable improvements were placed upon the land, but not until August, 1889, did the owner challenge the possession or the rightfulness of the claim and possession of the occupant. It was then too late; that possession had ripened into a title.

As the evidence is undisputed, there is no necessity for a retrial of the facts, and therefore the judgment of the court will be reversed, and the cause remanded, with the direction to enter judgment in favor of the plaintiff in error. All the justices concurring.

3. TACKING POSSESSIONS

ERCK v. CHURCH.

(Supreme Court of Tennessee, 1889. 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641.)

Appeal from chancery court, Shelby county; B. M. Estes, Chancellor.

DICKINSON, Special Judge. Complainant filed this bill September 25, 1886, to recover possession of a parcel of land in Memphis, fronting 3 feet and 10 inches on Lauderdale street, and 5 feet 7½ inches on Humphries street, being 309 feet in length. It is admitted that complainant has a good legal title, and that he has a right to recover, unless it has been defeated by the operation of the statute of limitations. Mackall sold and deeded to Warner a lot contiguous to the parcel in dispute, fronting 50 feet on Lauderdale street and the same width on Humphries street, bounded by parallel lines. In taking possession Warner did not measure his 50 feet. Mackall, at the time Warner purchased, pointed to a group of trees, and designated one as being on the south boundary line of the lot sold. Warner fenced in his purchase and placed his south fence along the line indicated, believing that he was inclosing the parcel purchased of Mackall, and no more. He in fact inclosed with his 50-foot lot the parcel in dispute, and from that time continued to hold as his own the entire tract included by his fences. Warner sold to defendant, Church, by deed, following the description in the deed from Mackall to him, which embraced the 50 feet, but not the parcel in dispute; and Church took possession of the whole tract, as inclosed by Warner, and held it as his own. It is admitted that Church has not held seven years, but that Warner and Church together have held more than seven years.

Complainant contends that the statute of limitations has not operated for these reasons: First. That Warner did not intend to inclose any ground but the 50 feet he purchased; that he took possession of, and held the disputed parcel by mistake; and that, therefore, the statute was not set in motion, because an essential requisite, namely, an

intention to hold adversely, did not exist. Second. That the periods of possession by Warner and Church cannot be connected, because they are both wrong-doers, and there is no privity between them.

On the first question we are without precedent in this state. The case of *Gates v. Butler*, 3 Humph. 447, is erroneously cited by complainant as sustaining his contention. In that case plaintiff asserted title by constructive possession of a large tract, a portion of which he claimed to have held adversely for seven years by actual possession. This possession, if it existed, came by inclosing a small portion of land in the disputed grant by mistake, in placing the fence on the supposed boundary line of a contiguous tract held by a different title. The proof made it most probable that the fence was on the true boundary line. The court said: "Under these circumstances, the court charged that the accidental and unintended inclosure of a small part of the land for seven years would not vest a valid title, etc. In this we think there was no error, and we affirm the judgment." There is a wide difference between a plaintiff actively setting up a title claimed to be perfected by accidental possession of a portion of land embraced in an instrument giving a color of title, and one defending by a possessory right to the extent of his actual inclosures. A court would be slow to assist one who though having a color of title to a tract of land by mistake, and without intention to assert his title, had inclosed an insignificant portion of the tract, and afterwards, on discovering his accidental holding, sought to extend by construction this possession so as to invest himself with an indefeasible title to the whole, and thus convert the possession which might be a shield for defense commensurate with his actual occupancy into a weapon of attack as far-reaching as the limits embraced in his deed. The case of *Gates v. Butler* decided that such possession could not avail for such a purpose and nothing more.

The courts of the different states are in conflict upon the question we are considering. In *Wood on Limitation of Actions* the opposing rules are stated, and the cases sustaining them respectively are cited. Section 263. In *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680, the defendant occupied lands not embraced in his deed, under the mistaken idea that they were included in his deed. There was no evidence that he intended to occupy such lands adversely except such as might be afforded by the fact that he occupied and used them as his own. The court held that he thereby acquired title to the land by possession. Under the second section of the act of 1819 "no person, or any one claiming under him, shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued." If one enter upon the land of another, whether with intent to disseise or mistaking it for his own, a right of action accrues at once to the owner. If the one so entering holds and claims the land as his own for seven years continuously, then, certainly, the conditions of the statute will have been

fulfilled. The right of action of the true owner accrues at once upon the entry, and is not dependent upon the state of mind or the knowledge as to boundary lines possessed by the owner entering. If the fact of knowledge or intent were an essential element of disseisin, then the real owner would have no right of action against one who had entered by mistake, until after he was convinced of his mistake, and then, with knowledge of his error, continued to hold, thus altering the character of his possession, and technically ousting the true owner by a change of mental condition.

Such a contention, under our statute, is not tenable. The right of action accrues when one takes possession as his own, whether by mistake or otherwise, and the right of recovery is barred in seven years from such entry, if the possession be unbroken. The possession and adverse holding are notice to the world and to the true owner, to the extent of the occupancy, and the visible physical fact should not be overcome by mere refinements based upon mental status. To hold otherwise would be to place the intentional wrong-doer in a better position than one who had innocently entered upon the lands of another, and expended his means in good faith. The intentional land-grabber, who, with premeditated wrong, took possession of lands, would be protected, while one who, by error of surveyor or as to natural monuments, innocently and by mistake entered on the wrong land and improved it in good faith, would not be protected if he held twice seven years. A mistake of a surveyor in locating a city lot for valuable improvements might cause one to place a wall a few inches beyond the actual line called for by his deed, and no length of possession short of the time required for a presumption of a grant would quiet the possessory right. It is manifest from the proof in this cause that Warner and Church intended to hold all the ground embraced by their fences as their own. Such possession was adverse under our statutes, whether it was by mistake as to the real boundaries or not; and, if continued for seven years, it would bar an action for recovery of the land so held.

The next question for consideration is whether, upon the facts in this case, the bar was complete. It is admitted that Church has not held for seven years, and that to make out his defense he must tack his possession to that of Warner. The deed from Warner to Church does not convey the land in controversy. There is no evidence that Warner, by deed or otherwise, undertook to transfer to Church his possessory right to this ground. There is no connection between them in respect to it, except the fact that Church took possession of it along with the 50 feet deeded to him by Warner. Can the two possessions be connected, so as to make out the seven years? The declaration that the successive possession of trespassers cannot be united, for the reason that there can be no privity between wrong-doers, has appeared from time to time in our reports.

In *Moffitt v. McDonald*,—a case of holding slaves,—the period of adverse possession being fully made out without connecting different possessions, Judge Totten (11 Humph. 464) says: "It is a well-settled principle, alike applicable to real and personal property, that between successive wrong-doers, having no title, there can be no privity, and therefore their possessions cannot be united so as to make out the time required to form the bar of the statute of limitations." The proposition stated was not involved in the case. *Wells v. Ragland*, 1 Swan, 502, and *Hobbs v. Ballard*, 5 Sneed, 396, were both cases of adverse holding of slaves, and, curiously enough, in each, not the defendant, but the complainant, sought to connect the several possessions, so as to avoid the effect of the statute of limitations, inasmuch as all of the complainants were minors during the first possession, and under the rule in our state the bar would not have become complete until all of them had reached majority; whereas, when the second possession began, one was of age, thus barring all, unless suits were brought within the time fixed by the statute for the one who was free from disability. Though the successive possessions were connected by sale and transfer, the complainants sought in vain to tack them, and make them one; the court holding that each new possession was a conversion, and that there could be no privity between wrong-doers.

In *Clark v. Chase*, 5 Sneed, 637, the doctrine before stated is broadly asserted, but it was not called for by the case. Judge Caruthers says: "The complainant's counsel contend that the case is analogous to successive possession of naked trespassers or wrong-doers, which it has been often held by this court cannot be united in order to make out the time required by the statute of limitations for the bar under the act of 1819." He, however, cites no cases adjudicating this question. In *Baker v. Hale*, 6 Baxt. 47, the court expressly held that the successive possessors were not trespassers; the first having gone in by parol contract to purchase, and having transferred by deed his right to the second. Judge Nicholson, however, in his opinion says: "It is settled by repeated adjudications in this state that the successive possessions of trespassers cannot be so connected as to make up the bar of seven years under the second section of the act of 1819, and for the reason that there can be no privity between wrong-doers,"—citing three of the cases above commented on, and *Vance v. Fisher*, 10 Humph. 213.

In *Nelson v. Trigg*, 4 Lea, 701, although the facts and the decision of the case did not call for it, the principle is stated as follows: "A naked trespasser, without color of title, cannot transmit his right to a successor, so as to enable the latter to couple the two possessions to make out the bar of seven years." This doctrine, so often reiterated as an established and familiar principle of our land law, is not directly adjudicated by any case in our state which has been called to our attention. In *Vance v. Fisher*, 10 Humph. 212, the defendant undertook to connect his possession with that of a prior possessor, which the

court denied him, on the ground that he had received the possession from the administrator of the first possessor, and that the administrator, having no control over his decedent's land, had no right to transmit the possession so as to connect the two, and that for this reason the defendant "must be regarded as being in possession of the land, not in privity with the previous possessor, but as a wrong-doer, who cannot couple his possession with that of a prior possessor." It would seem inferentially that the conclusion would have been different had the possession been passed by the first possessor himself. This, however, would not have been a precedent for the case under consideration, inasmuch as the first possessor in the case in 10 Humph. 213, had entered under a contract by which one Orr had sold him the land with covenant to convey, which constituted a color of title.

A leading case in this state, and one frequently cited by judges and text-writers, is *Marr v Gilliam*, 1 Cold. 491. The point actually decided was that the possession of one who had entered lawfully upon land by deed as a tenant in common, but who subsequently began to hold adversely to the other tenants in common, might be connected with that of his heirs so as to make out the period of the statute, because there is a privity of estate between ancestor and heir, but that the wife of such first possessor could not connect her possession with his, because there was no such privity between husband and wife. Judge Wright (page 504) thus states the law: "Separate successive disseisins do not aid one another where several persons successively enter on land as disseisors, without any conveyance from one to another, or any privity of estate between them other than that derived from the mere possession of the estate. Their several consecutive possessions cannot be tacked, so as to make a continuity of disseisins of sufficient length of time to bar the true owners of their right of entry." On pages 509, 510, Judge Wright discusses the cases of *Wallace v. Hannum*, 1 Humph. 443, 34 Am. Dec. 659; *Norris v. Ellis*, 7 Humph. 463; and *Crutsinger v. Catron*, 10 Humph. 24,—and criticises as dicta the statements in those opinions that a trespasser by mere possession, without color of title, acquires no right that is either alienable or descendible.

As previously stated, Judge Nicholson, in *Baker v. Hale*, 6 Baxt. 48, says: "It is settled by repeated adjudications in this state that the successive possessions of trespassers cannot be so connected as to make up the bar of seven years under the second section of the act of 1819, and for the reason that there can be no privity between wrong-doers." In this case he reviews *Marr v. Gilliam*. On page 51 he apparently approves the statement of the law as made by Judge Wright, to the effect that successive possessions of trespassers may be tacked together where the successive possessors hold the land as their own, and there is a privity of estate between them. On the next page, however, he says that the possessory right of a naked trespasser is not descendible or alienable. This is clearly in conflict with the position of

Judge Wright. In neither case, however, was the law, as stated, called for. Thus we have conflicting declarations of the law from eminent judges, but none of them are stamped with the authority of an adjudged case.

In *Wait's Actions and Defenses* the following is stated to be the law: "Where there are several successive adverse occupants of real property, the last one may tack the possession of his predecessor to his so as to make a continuous adverse possession for the time required by the statute, provided there is a privity of possession between such occupants, and in case of an actual adverse possession such privity arises from a parol bargain and sale of the possession of the premises, followed by delivery thereof, as well as by a formal conveyance from one occupant to the other." Volume 6, p. 455, and the cases there cited. In *Weber v. Anderson*, 73 Ill. 439, the facts presented a case involving almost every essential element embodied in the case under consideration. The instruction in the lower court to the jury was that the rights acquired by the first possessor could not be transmitted except by deed. The case was reversed, the superior court saying that there was "parol proof showing the plankroad company transferred their possessions over to him," (the defendant.) It was held that parol proof was sufficient to show the transfer of possession, and that it could be tacked to the subsequent holding. It does not clearly appear in that case whether or not there was an actual transfer of a possessory right by parol. The language of the court would admit of this construction. If, however, the possession merely passed, as in the case under consideration, *sub silentio*, without any knowledge by either party that there was such a possessory right, and that it was being transferred in the case, it is an extreme one.

The opposite conclusion was reached under a similar state of facts by the supreme court of Wisconsin in *Graeven v. Dieves*, 68 Wis. 317, 31 N. W. 914. In *Fanning v. Willcox*, 3 Day (Conn.) 258, the rule, (as quoted by Wood, *Lim.* 582, note,) is thus stated: "Doubtless the possessions must be connected and continuous, so that the possession of the true owner shall not constructively intervene between them, but such continuity and connection may be affected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact."

This is in substantial accord with the doctrine as stated by Judge Wright in *Marr v. Gilliam*, which is approved by us. There must be a privity of estate connecting the successive possessions, and a transfer of the possessory right by grant, inheritance, devise, or contract, verbal or written. The mere fact of successive possessions appearing, and nothing more, will not constitute such privity. If the contrary rule were adopted, then any independent trespasser entering upon land simultaneously with the abandonment of it by a prior trespasser could connect the two possessions, without any pretense of a privity of es-

tate, by merely showing that there had been no actual hiatus between the possessions. The deed to Church does not embrace the land in dispute, and there is no evidence that Warner undertook to transfer to Church his possessory right to it. On the contrary, it is shown that he was ignorant of having such right. There is no privity of estate between them in respect to this land. Warner both acquired and abandoned his possessory right in ignorance of its existence. The entry by Church was a new disseisin, and a new period of limitation began. The decree of the chancellor is affirmed.¹⁰

¹⁰ The doctrine of tacking may be modified or abrogated in some states by the local statutes. For example, it is held in South Carolina that, under the statute in that state governing adverse possession, the possession to be adverse must be continued by the same person for the statutory period of ten years, and that the possession of one cannot be united or tacked to that of those under whom he claims. *Garrett v. Weinberg*, 48 S. C. 28, 28 S. E. 3 (1896).

TITLE BY DEVISE AND DESCENT

I. Canons of Descent¹

BATES v. BROWN.

(Supreme Court of United States, 1866. 5 Wall. 710, 18 L. Ed. 535.)

This was a writ of error to the circuit court for the northern district of Illinois.

Kinzie Bates, the plaintiff in error, brought an action of ejectment in that court against Brown, the defendant in error, to recover certain premises. The cause was submitted upon an agreed statement of facts, which, so far as it was necessary to consider them, were as follows:

1 On the 29th of September, 1830, Alexander Wolcott bought of the state of Illinois certain lands, of which those in controversy were a part. At the time of the transaction he paid the purchase-money, and received the usual certificate.

2. He died on the 30th of October, 1830, leaving a daughter, Mary Ann Wolcott, his only child, and his wife, Eleanor, him surviving. He left a will, duly executed, which contained the following provision: "I further give and devise to my said wife, Eleanor M. Wolcott, and my said daughter, all my freehold estate whatsoever, to hold to them, the said Eleanor M. Wolcott and Mary Ann Wolcott, their heirs and assigns forever."

3. Mary Ann Wolcott, the daughter, died on the 16th of January, 1832, aged seven years, intestate and without issue.

4. On the 13th of May, 1833, Eleanor M. Wolcott conveyed to David Hunter, his heirs and assigns, with a covenant of general warranty, the premises in controversy.

5. On the 5th of July, 1833, a patent was issued by the governor of Illinois for the land purchased by Alexander Wolcott, as before stated, to his "legal representatives, heirs, and assigns."

6. Eleanor M. Wolcott, his widow, married George C. Bates on the 26th of May, 1836.

7. The plaintiff, Kinzie Bates, was the issue of that marriage, and was born on the 13th of April, 1838, and was the only child of his parents.

8. His mother died on the 1st of August, 1849, leaving her husband, George C. Bates, then and still surviving.

The plaintiff claimed title as the heir at law of his deceased half sister, Mary Ann Wolcott, under the rule of the common law, gen-

¹ For discussion of principles, see Burdick, Real Prop. § 242.

erally known as that of "shifting inheritance;" maintaining that although at the time of the decease the mother was the presumptive heir of the said Mary Ann, yet that by his own birth a nearer heir was created, and that the estate thus placed in the mother was divested from her, and vested in him, the son.

To understand the matter fully it may be well to state that the congressional ordinance of 1787 for the government of the Northwestern Territory, of which Illinois was originally part, created a court which it declared should have "common law jurisdiction;" and the ordinance guaranteed also to the people of the territory "judicial proceedings, according to the course of the common law." This ordinance declared that the estates of persons dying intestate "shall descend to and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and when there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall in no case be a distinction between kindred of the whole and half blood."

In 1819, after Illinois had become a state, a statute adopted "the common law of England" in general terms; and in 1845 another statute declared that the common law of England, "so far as the same is applicable and of a general nature, shall be the rule of decision, and shall be considered as in full force until repealed by legislative authority."

At the time of the decease of Mary Ann Wolcott, the statute of Illinois governing the descent of the real estate of persons dying intestate was as follows: "Estates, both real and personal, of resident or non-resident proprietors in this state, dying intestate, or whose estates, or any part thereof, shall be deemed and taken as intestate estate, and after all just debts and claims against such estate shall be paid as aforesaid, shall descend to and be distributed to his or her children, and their descendants, in equal parts; the descendants of a deceased child, or grandchild, taking the share of their deceased parent in equal parts among them; and when there shall be no children of the intestate, nor descendants of such children, and no widow, then to the parents, brothers, and sisters of the deceased person, and their descendants, in equal parts among them, allowing to each of the parents, if living, a child's part, or to the survivor of them, if one be dead, a double portion, and if there be no parent living, then to the brothers and sisters of the intestate and their descendants; when there shall be a widow, and no child or children, or descendants of a child or children of the intestate, then the one-half of the real estate, and the whole of the personal estate, shall go to such widow as her

exclusive estate forever, subject to her entire and absolute disposition and control, to be governed in all respects by the same rules and regulations as are, or may be, provided in cases of estates of *femes sole*; if there be no children of the intestate, or descendants of such children, and no parents, brothers, or sisters, or descendants of brothers and sisters, and no widow, then such estate shall descend in equal parts to the next of kin to the intestate, in equal degree, computing by the rules of the civil law; and there shall be no representation among collaterals, except with the descendants of the brothers and sisters of the intestate; and in no case shall there be a distinction between the kindred of the whole and half blood, saving to the widow, in all cases, her dower of one-third part of the real for life, and the one-third part of the personal estate forever."

The court below gave judgment for the defendant.

Mr. Justice SWAYNE delivered the opinion of the court, having first stated the case, and quoted the statute relating to descents just above set out.

Mary Ann Wolcott, from whom the plaintiff in error claims to have derived his title by inheritance, died nearly four years before his birth. During all the intervening time it is not denied that the title was vested in his mother and her grantee. Such was the effect of the statute. It is clear in its language, and there is no room for controversy upon the subject. Although born after the title become thus vested, he insists that upon his birth it became, to the extent of his claim, divested from the grantee and vested in him. His later birth and relationship to the *propositus*, he contends, is to be followed by the same results as if he had been living at the time of her death.

It is alleged that the rule of "shifting inheritances," in the English law of descent, is in force in Illinois, and must govern the decision of this case.

The operation of this rule is thus tersely illustrated in a note by Chitty, in his *Blackstone*: "As if an estate is given to an only child, who dies, it may descend to an aunt, who may be stripped of it by an after-born uncle, on whom a subsequent sister of the deceased may enter, and who will again be deprived of the estate by the birth of a brother. It seems to be determined that every one has a right to retain the rents and profits which accrued while he was thus legally possessed of the inheritance. *Harg. Co. Litt. 11; Goodtitle v. Newman, 3 Wils. 526.*"

Such is, undoubtedly the common law of England.

It is said the ordinance of 1787, which embraced the territory now constituting the state of Illinois, and the acts of the legislature of that state of the 4th of February, 1819, and of the 3d of March, 1845, are to be considered in this connection.

The ordinance created a court which it declared "shall have common law jurisdiction," and it guaranteed to the people of the terri-

tory "judicial proceedings according to the course of the common law." There is no allusion in it to the common law but these. The two acts of the legislature contain substantially the same provisions. What is expressed in the second act, and not in the first, is clearly implied in the former. The latter declared that "the common law of England, so far as the same is applicable and of a general nature," . . . "shall be the rule of decision, and shall be considered as in full force until repealed by legislative authority." Mary Ann Wolcott died, and the plaintiff in error was born before this act became a law, but it may be properly referred to as containing an exposition of the legislative intent in the prior act. Although the former act adopts "the common law of England" in general terms, it was undoubtedly intended to produce that result only so far as that law was "applicable and of a general nature."

By the common law, actual seizin, or seizin in deed, is indispensable to the inheritable quality of estates. If the ancestor were not seized, however clear his right of property, the heir cannot inherit.

According to the canons of descent, hereditaments descend lineally, but can never ascend. This rule is applied so rigidly that it is said "the estate shall rather escheat than violate the laws of gravitation."

The male issue is admitted before the female. When there are two or more males, the eldest only shall inherit, but females altogether.

Lineal descendants, in infinitum, represent their ancestors, standing in the same place the ancestor would have stood, if living.

On failure of lineal descendants of the ancestor, the inheritance descends to his collateral relations—being of the blood of the first purchaser—subject to the three preceding rules.

The collateral heir of the intestate must be his collateral kinsman of the whole blood.

In collateral inheritances, the male stock is preferred to the female. Kindred of the blood of the male ancestor, however remote, are admitted before those of the blood of the female, however near, unless where the lands have, in fact, descended from a female.

These principles sprang from the martial genius of the feudal system. When that system lost its vigor, and in effect passed away, they were sustained and cherished by the spirit which controlled the civil polity of the kingdom. The celebrated statute of 12 Car. II, c. 24, which Blackstone pronounces a greater acquisition to private property than Magna Charta, was followed by no change in the canons of descent. The dominant principles in the British constitution have always been monarchical and aristocratic. These canons tend to prevent the diffusion of landed property, and to promote its accumulation in the hands of the few. They thus conserve the splendor of the nobility and the influence of the leading families, and rank and wealth are the bulwarks of the throne. The monarch and the aristocracy give to each other reciprocal support. Power is ever eager to en-

large and perpetuate itself, and the privileged classes cling to these rules of descent with a tenacity characteristic of their importance—as means to the end they are intended to help to subserve.

Before the Revolution, some of the colonies had passed laws regulating the descent of real property upon principles essentially different from those of the common law. In most of them the common law subsisted until after the close of the Revolution and the return of peace. It prevailed in Virginia until the act of her legislature of 1785 took effect, and it was, perhaps, the law upon this subject in “the Northwestern Territory,” at the time of its cession in 1784 by Virginia to the United States. With the close of the Revolution came a new state of things. There was no monarch, and no privileged class. The equality of the legal rights of every citizen was a maxim universally recognized and acted upon as fundamental. The spirit from which it proceeded has founded and shaped our institutions, state and national, and has impressed itself upon the entire jurisprudence of the country. One of its most striking manifestations is to be found in the legislation of the states upon the subject under consideration. Of the results an eminent writer thus speaks: “In the United States the English common law of descents, in its most essential features, has been universally rejected, and each state has established a law of descents for itself.”

Another writer, no less eminent, upon this topic says: “In the law of descents there is an almost total change of the common law. It is radically new in each state, bearing no resemblance to the common law in most of the states, and having great and essential differences in all.”

So far as British law was taken as the basis of this legislation, in the different States, it was the statutes of Charles II and James II respecting the distribution of personal property, and not the canons of descent of the common law. The two systems are radically different in their principles.

The ordinance of 1787 contains a complete series of provisions upon the subject. They are the type and reflex of the action of many of the states at that time. The ordinance declared that the estates of persons dying intestate “shall descend to and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and when there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent’s share; and there shall in no case be a distinction between kindred of the whole and half blood.”

We find here not a trace of the common law. These provisions are diametrically opposed to all its leading maxims. We cannot infer

from their silence that anything not expressed was intended to be adopted from that source by implication or construction.

The statute governing the descent of real estate, already referred to, is also a complete code upon the subject of which it treats. It is to be presumed to cover every case for which the legislature deemed it proper to provide. If the same question had come before us under the ordinance, we should have said with reference to the common law, conflict is abrogation and silence is exclusion. The spirit and aims of the two systems are wholly different. One seeks to promote accumulation—the other diffusion. One recognizes and cherishes the exclusive claim of the eldest son—the other the equal rights of all his brothers and sisters. The latter makes no distinction on account of age, sex, or half blood. We apply to the statute also the remark that silence is exclusion. It speaks in the present tense—of the state of things existing at the time of the death of the intestate, and not of any change or different state of things which might occur thereafter. If the legislature had designed to provide for this case, according to the rule insisted upon, we cannot doubt that they would have said so in express terms. The statute bears no marks of haste or inattention. We cannot believe it was intended to leave a rule of the common law so well known, and so important, to be deduced and established only by the doubtful results of discussion and inference. The draughtsman of the bill could not have overlooked it, and the silence of the statute is full of meaning.

One class of posthumous children are provided for. We see no reason to believe that another was intended to be included, especially when the principle involved is so important. The intention of the legislature constitutes the law. That intention is manifested alike by what they have said and by what they have omitted to say. Their language is our guide to their meaning, and under the circumstances we can recognize none other. We cannot go farther than they have gone. The plaintiff in error asks us, in effect, to interpolate into the statute a provision which it does not contain. Were we to do so, we should assume the function of the legislature and forget that of the court. The limit of the law is the boundary of our authority, and we may not pass it.

The principle contended for was applied in the case of *Dunn v. Evans*, 7 Ohio, 169, pt. 1. The case is briefly reported, and no arguments of counsel appear. It was also adopted in North Carolina, in *Cutlar v. Cutlar*, 9 N. C. 324, and in *Caldwell v. Black*, 27 N. C. 463. No recognition of it is to be found, it is believed, in any other American adjudication.

The subject was elaborately examined by the supreme court of Ohio in *Drake v. Rogers*, 13 Ohio St. 21, and *Dunn v. Evans* was overruled. It came before the supreme court of Indiana in *Cox v. Matthews*, 17 Ind. 367, and received there also a thorough examina-

tion. The result was the same as in the last case in Ohio. The doctrine was repudiated.

The court said: "Under the laws of this state it is contemplated that such change of title from one living person to another is to be made by deed duly executed, rather than by our statutes of descent. * * * The feudal policy of tying up estates in the hands of a landed aristocracy, which had much to do with the shifting of descents as recognized by the English canons of descent, is contrary to the spirit of our laws and the genius of our institutions. It has been the policy, in this state, and in this country generally, not only to let estates descend to heirs equally, without reference to sex or primogeniture, but also to make titles secure and safe to those who may purchase from heirs upon whom the descent may be cast. Our laws have defined and determined who shall inherit estates upon the death of a person seized of lands. When those thus inheriting make conveyances, the purchasers have a right to rely upon the title thus acquired. If titles thus acquired could be defeated by the birth of nearer heirs, perhaps years afterwards, great injustice might, in many cases, be done, and utter confusion and uncertainty would prevail in reference to titles thus acquired. We are of opinion that the doctrine of shifting descents does not prevail under our laws, any more than the other English rule, that kinsmen of the whole blood, only, can inherit."

The rule is sanctioned by no American writer upon the law of descents. Judge Reeve (Reeve, Des. p. 74, Int.), speaking of distributees, says: "I am of opinion that such posthumous children who were born at the time of the distribution were entitled, and none others."

It is to be regretted that we have not the benefit of an adjudication by the supreme court of Illinois upon the subject.

Their interpretation—the statute being a local one—would of course be followed in this court. We have, however, no doubt of the soundness of the conclusion we have reached.

We find no error in the record, and the judgment of the circuit court is affirmed.²

² See, also, *Gardner v. Collins*, 2 Pet. 58, 7 L. Ed. 347 (1829), as to descent of remainders and reversions and *Davis v. Rowe*, 6 Rand. (Va.) 355 (1828), for analogies between the English statutes of distribution and American statutes of descent. In the United States, real estate of an intestate will descend by common law rules, except where specifically changed by statute. *Johnson v. Haines*, 4 Dall. 64, 1 L. Ed. 743 (1799); *Barnitz v. Casey*, 7 Cranch, 456, 3 L. Ed. 403 (1813).

TITLE BY OFFICIAL GRANT

I. Tax Titles ¹

CONNERS v. CITY OF LOWELL.

(Supreme Judicial Court of Massachusetts, 1911. 209 Mass. 111, 95 N. E. 412, Ann. Cas. 1912B, 627.)

Appeals from Superior Court, Middlesex County; Robert O. Harris, Judge.

Actions by Dennis E. Conners, by Joseph Walsh, and by Edward F. Conners against the City of Lowell. There were judgments granting insufficient relief to plaintiffs, and they and the city appeal. Affirmed in part; reversed in part.

RUGG, J. These are actions under St. 1909, c. 490, pt. 2, § 45 (formerly R. L. c. 13, § 44), to recover money paid for tax deeds which, it is claimed, by reason of error, omissions or informality in the sales, conveyed no title.

1. The form of tax deed used in several sales was that prescribed in St. 1901, c. 519. This form was in the law less than six months, having been repealed by R. L. c. 227, and supplanted by No. 14 of schedule of forms attached to R. L. c. 13, § 87. The question is whether this form, employed since 1902, was "suitable" under R. L. c. 13, § 87. The fact that the Legislature permitted its use for a brief period, and then in substance restored important recitals which had existed in earlier statutes, does not necessarily make it a suitable form for any other time than that during which it was expressly authorized. The requirements of law as to a tax sale were the same both before and after 1901.

A tax deed in order to be valid as a suitable instrument of conveyance, when not in the language of the statute, must set out either in precise phrase or by fair intendment to a reasonable certainty a statement of performance of all these acts which are essential to the existence of a legal cause for selling at the time when the sale was made. Although the terms of a tax deed need not show actual compliance to a technical nicety with the minute particulars of statutory requirements in making the sale itself, yet they must satisfy a reasonable mind without resort to extrinsic evidence that a valid cause of sale in fact existed. The collector of taxes has a naked power to sell real estate to pay the lien for taxes, and he must not only strictly conform to all the conditions precedent to the exercise of his power, but his deed must also contain all the recitals of substance which the stat-

¹ For discussion of principles, see Burdick, Real Prop. §§ 248-250.

title imposes, both for the information of the purchaser and of the owner and of those claiming under each. *Charland v. Home for Aged Women*, 204 Mass. 563, 91 N. E. 146, 134 Am. St. Rep. 696, and cases cited; *Harrington v. Worcester*, 6 Allen, 576; *Langdon v. Stewart*, 142 Mass. 576, 8 N. E. 605. Adherence to the somewhat strict rules which have been established as to tax deeds assumes a new importance in view of the sweeping provision of St. 1911, c. 370, to the effect that when duly recorded such a deed "shall be prima facie evidence of all facts essential to its validity." Compare St. 1901, c. 197; R. L. c. 13, § 43; St. 1902, c. 423. Several objections are made to the deeds based on their variation from said form No. 14.

(a) The newspapers in which the notices of sale were printed were described by name as the "Lowell Sun," "Lowell Daily Telegram" and "L'Etoile" without any further assertion as to the place of publication than that it was "in the county where said real estate lies." Although there is no statement in the deed of the city or town within which the real estate lies, it may fairly be inferred from the circumstance that the deed was headed "Commonwealth of Massachusetts," that the Lowell Sun and the Lowell Daily Telegram were published in Lowell in this commonwealth. Newspapers sometimes bear as a part of their title the name of a small country town, although not published there (*Rose v. Fall River Sav. Bank*, 165 Mass. 273, 43 N. E. 93; *Brown v. Wentworth*, 181 Mass. 49, 62 N. E. 984), but no one reading these deeds would have any reasonable doubt as to the fact that these newspapers were published in the city of Lowell. This is not true of the newspaper called L'Etoile. There is nothing about this name to indicate the place of its publication. Although the words of the statute reach only to "the name of the newspaper," yet in order to show the existence of a legal cause of sale the place of its publication as required by R. L. c. 13, § 1, must appear in the deed.

(b) R. L. c. 13, § 40, provides that the notice of sale shall be posted "in some convenient and public place." The deeds recite such posting "in city hall, a public place in said Lowell." It is not every public place which would be "convenient" for putting up notices of tax sales. City halls as matter of common knowledge are used generally for such purposes. Halls of this character exist in all municipalities, and the statement in a tax deed, that such a place is convenient for this use, affects no right of the person assessed or of the purchaser, and can add nothing to their knowledge. Under these circumstances failure to follow the prescribed form was not fatal. A quite different case would arise if the public place described was not one commonly known to be convenient for such purposes.

(c) It was a condition precedent to the right of the tax collector to sell that the advertisement should contain "the names of all owners known to the collector." R. L. c. 13, § 38. Omission of those names from the advertisement would deprive the collector of any cause for

making the sale. All the statutory forms save that in St. 1901, c. 519, require such a statement. Without such a statement the deed in an essential particular, not fairly inferable from other parts of the instrument, fails to show the existence of a cause for sale.

(d) The narration of the terms of the advertisement set out in the deed was that the sale would be for "nonpayment" of taxes, while said form No. 14 was in the words that the sale would be for the "discharge and payment" of the tax. The statement in the deed was supplemental as to cause, while that in the form indicates the purpose of the sale. It is plain from the deed that the only purpose of the sale was to satisfy the tax. In this regard no substantial error appears.

(e) R. L. c. 13, § 38, requires that the published notice of the sale shall "contain a substantially accurate description of the several rights, lots or divisions of the land to be sold," while by section 41 the collector must sell "the smallest undivided part of the land which will satisfy the taxes and necessary intervening charges or the whole if no person offers to take an undivided part." The deed states that the advertisement was for the sale of "the smallest undivided part of said estate," sufficient to discharge the lien. The sale was of the whole and not any undivided part. The sale could not lawfully have been made of any larger estate than had been advertised. Hence in this particular the form of deed is defective in the statement of a cause for the sale of the whole. All sales in which this form was used were invalid.

It is not necessary to determine whether these deeds were also invalid in not containing enough to warrant a fair inference as to the municipality within which the land conveyed was situated.

2. Certain lands were properly assessed to the "heirs of George T. Woodward" and to the "heirs of Irene E. Richardson," under R. L. c. 12, § 21. In these instances the records of the probate court for the county, in which Lowell is located, showed, on the 1st of May of the year in which the taxes were assessed, who the heirs of Woodward and Richardson severally were and that one or more of the heirs of each resided in Lowell. The recitals in the deeds of this class were that demand was made upon "the heirs" of deceased. The collector is required to serve a demand for the payment of the tax upon every resident assessed, or in case of heirs of a deceased person, upon one of them, and to state in his deed "the name of the person on whom the demand * * * was made." R. L. c. 13, §§ 14 and 43. To say that a demand has been made upon the heirs of an intestate is not giving the name of the person upon whom the demand was made. The two sections cited impose upon the collector the duty of finding a resident heir, if there is one, making the demand upon him, and then naming him in the deed. To name a person is not the same as to describe him. The name of a person is the distinctive characterization in words by which he is known and distinguished from others. Such

a designating appellation was not given by the words "heirs of" a person. Tax deeds lacking it are invalid. *Reed v. Crapo*, 127 Mass. 39. Assessors are charged with notice of what may be found upon the probate records in determining whether to make an assessment to the heirs or devisees of one deceased. *Tobin v. Gillespie*, 152 Mass. 219, 25 N. E. 88. There is no hardship in holding the tax collector to the same investigation, if necessary, in ascertaining the name of an heir.

3. The advertisement of sale in several instances was printed in English in a newspaper printed in the French language. R. L. c. 13, § 1, provides that "Publications, as applied to any notice, advertisement or other instrument, the publication of which is required by law, shall mean the act of printing it * * * in a newspaper published in the city or town, if any, otherwise in the county, where the land * * * is situated." English is the language of this country. This conception is fundamental in the administration of all public affairs. It is an elemental truth, so axiomatic in its nature as to need no supporting authority. It is not declared in the Constitution nor enacted by statute. It is so by the universal customs of our past in colony, province and commonwealth. Apart from the more obvious considerations, there are indications that the English language is that of our institutions in the requirement that no one can be a voter or eligible to office unless able to read the Constitution in English (article 20 of Amendments to Constitution), nor solemnize marriage unless able to read and write in that language (R. L. c. 151, § 30). Instruction in the English language is required in all public and private schools. R. L. c. 42, § 1; *Id.* c. 44, § 2. It is plain that a general public notice required by law to be published in a newspaper must be printed in English in an English newspaper. The great weight of authority supports this view. *Auditor General v. Hutchinson*, 113 Mich. 245-249, 71 N. W. 514; *State v. Chamberlain*, 99 Wis. 503, 75 N. W. 62, 40 L. R. A. 843; *Chicago v. McCoy*, 136 Ill. 344, 349, 26 N. E. 363, 11 L. R. A. 413; *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401; *Road in Upper Hanover*, 44 Pa. 277; *Wilson v. Trenton*, 56 N. J. Law, 469, 29 Atl. 183; *North Baptist Church*, 54 N. J. Law, 111, 22 Atl. 1004, 14 L. R. A. 62; *State v. Jersey City*, 54 N. J. Law, 437, 24 Atl. 571; *John v. Connell*, 71 Neb. 10-16, 98 N. W. 457; *Cincinnati v. Bickett*, 26 Ohio St. 49. There are decisions having a contrary appearance in *Richardson v. Tobin*, 45 Cal. 30, *Loze v. New Orleans*, 2 La. 427, and *Kernitz v. Long Island City*, 50 Hun, 428, 3 N. Y. Supp. 144. So far as they are in conflict with the principles here stated we are not inclined to follow them. The deeds which rest upon a publication of the advertisement in a newspaper printed in French are invalid.

4. Certain lots of land not of the small character indicated in St. 1909, c. 490, pt. 2, § 50 (formerly R. L. c. 13, § 49), are described in

the deed by lot numbers, the street and side of street on which located, and the name of all abutting owners, with the general points of compass on which the land of abutting owners lay, but without further designation by metes and bounds, and without reference to any plan upon which the lot as numbered may be found. A sample description of this kind was "three thousand seven hundred fifty-five (3,755) sq. feet of land, more or less, being lots 549-550 on the east side of Tanner street with land now or formerly of Woonsocket Inst. for Sav. on the north and south and Merchants street on the east and Tanner street on the west." While this description reached nearly to the line of indefiniteness, it is on the whole sufficient. It gives data enough to enable one to make a reasonable identification of the property. It indicates a parcel of specified area, rectangular shape, lying between two streets and between lots of other defined owners, presumably a portion of a large tract subdivided into smaller parts. Practically the same information is conveyed in the instances when the rear of the lots bound, not upon a street, but upon another named owner. As matter of common knowledge it is a kind of description not infrequently found in deeds especially of land in the country. To require a greater particularity would impose upon the tax collector the necessity of an expensive survey in many cases. While the descriptions in a tax advertisement must be such as to enable both owner and bidder from its terms to locate with substantial certainty the land to be sold, it need not be so detailed as to point out visually its precise boundaries so that an utter stranger unacquainted with the locality and ignorant of the neighbors could find it without inquiry. Applying the rule laid down in *Williams v. Bowers*, 197 Mass. 565-567, 84 N. E. 317, and the numerous cases there cited, and bearing in mind that one executing only a statutory power in the sale of land must be held to some strictness, the conclusion follows that there is no invalidity in the deeds of this class.

5. The same rule governs the deeds, where the description is similar in all respects to those last discussed, except that the land is said to be a "part of lots" whose numbers are given. Lot numbers without reference to any plan upon which they may be found plotted are of no further assistance in either case than to convey the information that the parcel described is a subdivision of a larger tract. The sufficiency of the description rests on its other elements.

6. An assessment of land was made to a person not in possession but holding a tax collector's deed thereof, valid on its face and duly recorded, who had failed by inadvertence to file in the registry of deeds or with the city treasurer the statement of his residence and place of business required by R. L. c. 13, § 45. This section is chiefly for the benefit of the owner in furnishing him information as to where to find the person to whom he may make tender for purpose of redeeming. He has, however, the alternative or cumulative right

to make payment to the tax collector. St. 1902, c. 443. It is not necessary to decide what effect, upon the rights and obligations between themselves of one entitled to redeem and one holding a tax title, the failure of the latter to comply with said section 45 may have. The tax law contains no provision that omission to record such certificate shall render the sale invalid, as it does respecting the time within which the deed shall be recorded. R. L. c. 13, § 43 (now, with subsequent amendments, St. 1909, c. 490, pt. 2, § 44). The thing required by said section 45 can be done only subsequent to the record of the tax deed. Its substance does not relate to any matter inherently affecting the title, but solely to facilitating the ease of redemption. As a general rule assessors in levying subsequent assessments and the tax collector in selling thereunder may treat the holder of a duly recorded tax deed valid on its face as the record owner. *Rogers v. Lynn*, 200 Mass. 354, 86 N. E. 889; *Slois v. Williams*, 205 Mass. 350, 353, 91 N. E. 148. The purposes of the requirements of said section 45 do not appear to include an obligation upon the assessors to make a further examination of the record, beyond finding a duly recorded valid looking tax deed, to ascertain whether the holder has recorded also the necessary certificate and to determine at their peril the sufficiency of its form and whether it has been recorded within a reasonable time. Whatever may be other effects of the failure of the purchaser to record such certificate, the tax deed is not so affected thereby as to furnish no basis for subsequent assessments. See *McNeil v. O'Brien*, 204 Mass. 594-597, 91 N. E. 138. The deeds questioned upon that ground are sufficient in that regard.

8. Certain deeds now challenged were made on sales of real estate assessed to persons as owners whose title was under tax deeds, in each of which the land was described only by its area in square feet, more or less, the street and side thereof on which it was located, and the number of the lot without reference to any plan. In fact, there was a private plan on record at the registry of deeds and a plan at the office of the city engineer, on which the several lots could be sufficiently identified. This description was insufficient. It differs from those discussed under paragraphs 4 and 5 of this opinion, in that the names of no abutting owners were given, nor was there anything to show the shape of the parcel. The designation of it by a lot number without naming the plan or showing where it might be found or giving any other descriptive circumstance was too indefinite. The tax deed was also in the form held insufficient in an earlier part of this opinion. These deeds were therefore invalid on their face and on inspection show that they convey no title.

The question is whether one holding under such a deed invalid on its face "is a person appearing of record as owner" within the meaning of these words in R. L. c. 12, § 15. See St. 1909, c. 490, pt. 1, § 15. The rule established by *Butler v. Stark*, 139 Mass. 19, 29 N. E.

213, that the holder of a tax deed was such a record owner has been applied in *Roberts v. Welsh*, 192 Mass. 278, 78 N. E. 408, and *Welsh v. Briggs*, 204 Mass. 540-552, 90 N. E. 1146, to cases where the tax deeds, good on their face, were invalid by reason of some error in the original assessment or otherwise, not apparent upon an examination of the deed itself. But the rule has never been extended to a case where the tax deed showed on its face that it conveyed no title. A tax deed stands or falls on its own unaided merits. It must be delivered and recorded within 30 days from the sale. Its worth is to be determined as of that date. It cannot be supplemented or changed by subsequent instruments. Its errors and inaccuracies cannot be corrected, nor can its defects be supplied from any source. When by its terms it is obvious that it does not convey a title, it fails utterly to affect the rights of the original owner. He remains the only person "appearing of record as owner" of the property. It follows that an assessment based upon a tax deed which is invalid on its face is not an assessment to an owner of record. Sales founded upon such an assessment are void.

These determinations dispose of all the deeds in question and it is not necessary to discuss the other points argued.

The result is that the judgments entered in the superior court in the actions in which Dennis E. Conners and Joseph Walsh are the plaintiffs are affirmed. The judgment in the action, in which Edward F. Conners is the plaintiff is reversed. So ordered.²

KERN v. CLARKE.

(Supreme Court of Minnesota, 1894. 59 Minn. 70, 60 N. W. 809.)

Appeal from district court, Wadena county; G. W. Holland, Judge.

Action by Anton Kern against N. P. Clarke, in which there was a judgment for plaintiff. From an order denying a motion for a new trial, defendant appeals. Reversed.

Buck, J. This action involves the validity of a tax judgment, and the sale of real estate under it. The delinquent list described the land as being the "S. E. 4, N. E. 4, and N. E. 4, S. E. 4, S. 24, T. 137. R. 35," but the published list described the land as being the "S. E.

²In accord with the views expressed by the court in the preceding case, that public legal notices must be published in the English language, may be cited another recent case, namely, *Tylee v. Hyde*, 60 Fla. 389, 52 South. 968 (1910), in which Chief Justice Whitfield says: "The English language is the means recognized by our law for communication and information; and, while a paper printed in a foreign language may be a newspaper, it may not be within the purview of a statute requiring the publication of legal notices designed for the information of all the people, where the statute contains nothing to indicate an intention to include such a publication." And see, also, *Whiteley v. Baltimore*, 113 Md. 541, 77 Atl. 882 (1910).

¼, N. E. ¼, and N. E. ¼, S. E. ¼," while the tax judgment described the land as the same as in the delinquent list. The description in the delinquent list and in the tax judgment were clearly insufficient, and the tax judgment void upon its face. We need not enter into any discussion upon this point, for the question was distinctly passed upon by this court in *Keith v. Hayden*, 26 Minn. 212, 2 N. W. 495; and that case was cited approvingly in *Williams v. Land Co.*, in 32 Minn. 440, 21 N. W. 550, and *Knight v. Alexander*, 38 Minn. 384, 37 N. W. 796, 8 Am. St. Rep. 675. That such descriptions are void for uncertainty ought to be deemed the settled law of this state, without further litigation or controversy.

The next point is as to the power or authority of the trial court to permit the plaintiff, after the sale, to amend the tax judgment so as to read as follow: "S. E. ¼, N. E. ¼, and N. E. ¼, S. E. ¼," instead of "S. E. 4, N. E. 4, and N. E. 4, S. E. 4," as originally described in the judgment. This amendment was permitted by the court upon application of the plaintiff. The judgment was entered on the 3d day of August, 1883; and it does not appear that any application, prior to the time of the trial, had been made to amend or correct the judgment. But, irrespective of the question of this delay, we are of the opinion that there is no inherent power in the court to authorize an amendment of a judgment in the manner attempted in this case, and we are not referred to any statutory authority where such power is conferred upon the court.

This is not a mere voidable judgment, but the lack of jurisdiction to enter it appears upon the face of the record itself. The description of the land in the delinquent list was so uncertain as to be void, and as the same erroneous description appears in the judgment the whole proceeding was void. Such a judgment is a mere nullity, and confers no right and impairs none. It is not like an irregular judgment, which may be corrected by courts when the party takes the proper legal steps to have it amended. The description means nothing, describes nothing, and amounts to nothing. Valuable property rights ought not to be lost or gained upon such descriptions. The defect is not a mere irregularity, but jurisdictional; and the judgment rendered upon it cannot be construed by parol evidence to mean something else than what appears upon its face, especially where such evidence attempts to change the want of jurisdiction to jurisdiction. "An imperfect or vague description in a tax deed cannot be aided by parol evidence." *Black, Tax Titles*, § 407.

Even if this were not so, a sale was made of the imperfectly described premises on the 17th day of September, 1883, which sale was based upon the judgment as it stood at the time of its rendition. If the judgment was void, the sale made under it was void. An amendment of the judgment would not, of itself, give validity to the sale. It was held by this court in *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497, that sales already had under such judgment could not be affected

by amendment of the judgment. And Black on Tax Titles (section 409) uses the language, "A tax title is purely technical, as distinguished from a meritorious title, and depends for its validity on a strict compliance with the statute."

The other points argued by counsel need not be discussed here, for they are not necessary to the disposition of the case. Both the order denying a motion for a new trial and the order correcting the tax judgment are reversed.

GILFILLAN, C. J., absent on account of sickness, took no part.

II. Eminent Domain ³

LEHIGH VALLEY R. CO. v. McFARLAN.

(Court of Errors and Appeals of New Jersey, 1881. 43 N. J. Law, 605.)

On error to the Supreme Court.

DEPUE, J.⁴ The defendant is the lessee of the Morris Canal & Banking Company. In 1871 the property, works and franchises of the latter company were granted to the defendant by a perpetual lease, under the authority of an act of the legislature. Pamph. L. 1871, p. 444.

The lessor was incorporated in 1824, for the purpose of constructing a canal to unite the river Delaware, near Easton, with the tide waters of the Passaic. Pamph. L. 1824, p. 158. The canal was constructed from the Delaware to the Passaic about 1830. In 1845 it was enlarged throughout its entire length, to provide for navigation with boats of greater capacity. In 1857 the company renewed the timbers in its dam across the Rockaway river, and placed new flash boards upon it. In 1875 the flash boards were replaced by timbers firmly spiked on the top of the dam, and made part of its permanent structure.

The plaintiff is the owner of a mill situate on the Rockaway river, above the site of the dam. He complains of an injury to his mill by back water cast back upon it by means of the dam. The damages claimed are such as accrued between the 30th of December, 1876, and the 22d of September, 1877. As his declaration was originally framed, the theory of his action was that the dam at its increased height was an unlawful structure. At the trial the declaration was so amended as to present a claim for compensation for the damages sustained by the plaintiff between the days named, conceding that the canal company by its charter had power to take, and appropriate to

³ For discussion of principles, see Burdick, Real Prop. § 251.

⁴ Part of the opinion is omitted.

its use, lands and water, without compensation first made, and that therefore the dam was not, in itself, an unlawful structure.

By its act of incorporation the canal company was authorized to enter upon and take possession of and use such lands, waters and streams as might be necessary for its canal, without compensation first made. Entry upon and the appropriation of private property to its use by the company is not a trespass. Ejectment will not lie to oust the company from lands on which its canal is constructed, nor are its works liable to abatement as a nuisance to the water-rights of others, though compensation has not been made to the owners of lands or water-rights taken or injured by the company in the construction or operation of its canal. This construction of the company's charter is too firmly established to be now called in question. *Kough v. Darcey*, 11 N. J. Law, 237; *Den v. Morris Canal*, 24 N. J. Law, 587; *Lehigh Valley R. R. Co. v. McFarlan*, 31 N. J. Eq. 706. In the case last cited, which was between the parties to this suit, and related to the dam as now constructed, this court decreed that this defendant had and still has the right, under the charter of the canal company, to erect and maintain the flash boards, the subject of complaint in this suit. The lawfulness of the dam as constructed is *res adjudicata* by the decree in the last-mentioned suit.

In this court, upon the argument of this case for the first time in the several litigations between these parties, the contention has been made that the power to take and appropriate lands and waters to the use of the company expired in 1839, under the limitation in section 23 of the canal company's charter. At this stage of the controversy between these parties it is not permissible to raise that question. The rights of the parties in that respect have been fixed by the decree above referred to.

While the right of the canal company to enter upon and occupy lands necessary to construct its canal, and to appropriate waters necessary for the erection and use of its canal for the purposes of navigation, without compensation first made, is settled by the cases cited, it is equally well settled that the owner of lands taken, or whose water-rights are injured, is entitled to compensation for the damages sustained. The same section which confers the right to take possession of and use such lands and waters expressly declares that such possession and use shall be subject to compensation to be made therefor as is in the act directed. The twentieth section enacts that nothing in the act shall be taken to impair the right of any person to an action against the said company for damages to his or her water-rights, lands, tenements or hereditaments by the erection of said canal; and by the twenty-seventh section it is provided that the twentieth section shall be so construed as to extend to damages sustained not only by the erection of the canal in the first instance, but also by the subsequent operations of the company from time to time, as the same may arise. Liberal as the incorporating act is to the promoters of this

scheme of public improvement, its purpose was to secure compensation to the owners of lands and water-rights whose property was applied to the public use. All the cases cited recognize the right of persons injured to compensation for the injuries sustained.

The contention of counsel is with respect to the mode by which the owner of lands or water-rights shall seek his remedy. The defendant contends that upon the appropriation by the company of lands or waters to its use the right of the owner is to sue for and recover in one suit—once for all—the entire value of the lands taken or water-rights appropriated. The contention of the plaintiff's counsel is, that the occupation of lands or the user of waters without compensation having been made, is a continuing injury, for which successive actions may be brought, to recover the damages as they accrue from time to time.

The case, in the propriety of this suit, and in the form of this action and the pleadings, will turn upon the inquiry as to which of the foregoing propositions is sound. If the plaintiff's water rights were taken before the defendant's lease was made, and the right of the owner to redress by the charter is consummated and concluded when the taking is effected, then the plaintiff's remedy is by action against the canal company, by whose act the plaintiff was deprived of his property, and not against its lessee.

As early as 1830, it was held by Chief Justice Ewing, in *Kough v. Darcey*, 11 N. J. Law, 284, that the charter empowered the company to enter upon and take possession of and use lands and water-rights necessary for its canal, without compensation first made, and without becoming a tort-feasor thereby, subject to the owner's right to recover compensation for his injury, and to resort to legal proceeding to obtain recompense for damages to his lands, tenements, hereditaments and water rights, by the erection of the canal.

This construction was adopted and made the basis of decision in *Den v. Morris Canal*, 24 N. J. Law, 587. That case was decided expressly on the ground that the possession of lands taken by the company for its canal was not unlawful. Mr. Justice Elmer, in delivering the opinion of the court, quotes from the opinion of Chief Justice Ewing in *Kough v. Darcey*, and adopts his reasoning. He says: "Chief Justice Ewing, delivering the opinion of the court, remarks that this section (section 20) embraces all persons who may sustain injury, by actual occupation or otherwise, and covers the same extent of damages, right and estate which are provided for, and which may be satisfied by or vested in the company, by virtue of the previous sections; it is therefore one of the modes of compensation directed by the act. Authority being thus given to the company to take possession of and use the requisite land, subject to being sued by the proprietor for such damages as he thereby sustained, including the taking from him his estate therein, unless he thought proper to agree upon the proper compensation or to await an assessment, it follows as a

necessary construction that the taking and using was meant to be absolute, and not subject to be afterwards disturbed; the taking and using subjected the company to be called upon for compensation, at the option of the proprietor, to the whole extent of the injury done to his possession and estate, by means of a suit at law."

It is evident that the legislative purpose, as expressed in the twentieth and twenty-seventh sections, was to secure to persons injured in their property-rights, a remedy in conformity with the ordinary rules regulating actions at law, according to the nature and extent of the injury sustained. If the injury be one that in its nature is temporary and recurrent, such as might arise from the company's negligence in allowing its works to be out of repair, or from the temporary diversion or throwing back of water, arising from the irregular supply of water from extraneous sources, or the management of the gates of the canal locks, or from the occasional use of flash boards as a temporary expedient, successive actions for the damages sustained from time to time may, under the circumstances, be the appropriate remedy.

But when the company has effected a complete appropriation of property by the location of its canal on lands, or the appropriation of water-rights to its use by the construction of works designed to effect a constant and continuous diversion or flooding back of waters, such lands and water-rights are taken, and the damages consist in the entire value of the property taken. If, as has been conclusively adjudged, the company may take and appropriate property to its use without compensation first made, and its possession and use thereof be therefore lawful, there is no principle of law regulating actions and pleadings that will sustain an action, the very foundation of which is, that the possession or use of property without such compensation being made is a legal wrong. The twenty-seventh section gives no countenance to such an action. It extends the right of action, reserved by the twentieth section, to damages sustained not only by the erection of the canal in the first instance, but also by the subsequent operations of the company from time to time as the same may arise. The damages are sustained by the owner when his property is appropriated by the company to its use as a finality, and do not arise from time to time, from the occupation or use of it by the company.

This construction is in harmony with the course of decision on this subject in the courts of this state. It has been uniformly held that, in proceedings to condemn, the value of the lands and damages are to be appraised as of the time when they were taken, though the title may not pass until the appraised value is paid. In *North Hudson R. R. Co. v. Booraem*, 28 N. J. Eq. 450, it was held by this court that, where a railroad corporation having power to condemn, entered into possession and constructed its road upon the land, in proceedings subsequently prosecuted to condemn, the measure of compensation was the value of the land and damages at the time the entry was made, and

interest from that time. In *Trenton Water Power Co. v. Chambers*, reported in 9 N. J. Eq. 471, and 13 N. J. Eq. 199, the company entered into possession of lands by consent of the owners and constructed its canal upon them, and the order of the Chancellor was that the master should make an estimate and appraisal of their value and the damages as of the time when possession was taken. The rule is general that the assessment should be of the value at the time of the taking, although the statute provides that title should not pass until compensation is paid. *Mills on Eminent Domain*, §§ 174, 176.

The canal company is, by its charter, admitted into the possession of property required for its use, by the sovereign power of the legislature. If, after possession taken, proceedings are instituted for an appraisal thereof, pursuant to the sixth section, the value of the property, when it was taken and appropriated to the company's use, and interest, would be the measure of compensation to be awarded by the commissioners. It is clear that the same measure of compensation will be recoverable in an action by the owner under the twentieth section; for, the possession and continued use of the property being made lawful, the damages to the owner's land, tenements, hereditaments or water-rights, which he sustained by the erection of the canal, would be such as resulted from the complete appropriation of his property to the company's use, and the entire deprivation of all beneficial interest therein, and be equivalent to the whole value of the property at the time the owner was deprived of it by the company's entry upon it.

Any other view of the rights of the company and of the owners of lands and water-rights than that the injury is completed when the property has been taken and appropriated by the company to its use, and that the damages recoverable by the owner in his action will be the whole value of the property he has lost by the company's act, would work great injustice to the owners of property required by the company for its use. The owner to whom compensation has not been made cannot oust the company from the premises by ejectment. He cannot set on foot proceedings for the estimation of his damages by commissioners, under the sixth section of the company's charter, nor can he treat its possession and use as tortious, so as to visit upon the company punitive damages, by means of which to force the company to institute and carry into effect proceedings for the appraisal by commissioners of the value of his lands or water-rights. If he cannot recover the entire damages he has sustained in one action, and is remitted to repeated actions for damages pro tanto for the occupation or use of his property, the charter has placed him in the situation of permanently investing his property in the canal, from which the income derived will be the proceeds of repeated suits for damages, instead of enabling him to recover at once full compensation for the injury sustained. If the property should be land on which the canal is located, or consist of an improved mill-site rendered valueless by

the diversion or throwing back of water, it is manifest that successive actions for use and occupation or for the loss and inconvenience suffered from the deprivation of the beneficial use and enjoyment of his property, besides being vexatious, would afford the owner no adequate recompense for his injuries. He could not improve or repair the improvements which gave value to his property when it was interfered with, for reparation and improvement, if practicable, would be a useless expenditure of money for which he could make no claim to be reimbursed; nor could he suffer his property to fall into decay, for to suffer it to fall into decay, would deprive him of the ability to obtain compensation as he sought it from time to time, on the basis of the improvements in which its value intrinsically consisted, when his property was invaded by the company.

In all cases where property, whether it be lands or water-rights, has been permanently appropriated by the company to its use, the damages sustained are a unit, and are recoverable as such, and not by piecemeal. The injury is consummated when the company has permanently appropriated the owner's lands or water-rights to its use; and, as was said by Chief Justice Ewing, in *Kough v. Darcey*, "the right of action for such damages is not by anything in the act impaired, not weakened, not lessened, not even postponed to an indefinite period, for so to postpone is manifestly to impair."

It is clear, I think, that the action reserved by the charter, to the owner for damages to his or her water-rights, lands, tenements or hereditaments, is the means provided for him to obtain an appraisal and recovery of his damages, in case the company does not proceed to obtain an appraisal of them by commissioners. It will follow, therefore, that the damages recoverable in such action will be the same compensation which is determinable by the award of commissioners—full compensation for the injury done by the appropriation of the owner's property to the company's use; for the property being taken when it is appropriated by the company to its use, the extent of the injury will not depend upon the method adopted to determine the compensation due the owner of it. It will also follow from the substitution of an action by the owner for proceedings to appraise by commissioners, that the owner's action for compensation will not be barred by the statute of limitations, as ordinary actions of trespass or for debts are barred. He may proceed to have his damages appraised by action at any time before a right or title to the property has been acquired by adverse user or possession. Nor will his claim for damages be subject to a presumption of payment, such as is sometimes applied to debts, for until his damages are ascertained by action or by the award of commissioners, there is no debt to which a presumption of payment can apply. * * *

In the present case, it is a fact indisputable that there was a taking either in 1845, in 1857 or in 1875. The pleadings in the plaintiff's action are not adapted to such a state of the case, and the defendant

is under no obligation to submit to the vexation of successive suits upon a cause of action which is an entirety, single and inadvisable. Furthermore, if the taking was in 1845, or in 1857, or at any time before the defendant's lease was made in 1871, the plaintiff has misconceived his remedy. His action should then have been against the canal company, by whom his property was taken and the plaintiff's injury was done. It should have been left to the jury to determine whether the taking was before or after the defendant became the lessee of the canal and its works. * * *

RESTRAINTS AND DISABILITIES OF TRANSFERS

I. Restraints Imposed in Favor of Creditors¹

TODD v. NELSON.

(Court of Appeals of New York, 1888. 109 N. Y. 316, 16 N. E. 360.)

Appeal from general term, supreme court, Second department.

Action by Hester J. Todd and Mary Ophelia Green, as administrators, etc., of Harvey N. Todd, a mortgagee of land, to set aside as fraudulent a deed, made prior to the mortgage, to the defendant Isaac Nelson, impleaded with others. Judgment was entered for plaintiff, who appeals from an order of the general term granting a new trial.

PECKHAM, J.² This action was brought by the plaintiff to set aside and have declared void a deed said to have been executed by one Emma D. Owen to Isaac Nelson and Mary Ann Nelson, her father and mother. The deed conveyed certain premises in the county of Westchester belonging to Mrs. Owen, and it was recorded in the clerk's office of that county within a few days after it was executed, which was on the 20th of December, 1862. In 1867, the grantor in the deed, who, with her husband, had continued to occupy the premises, executed a mortgage thereon to one Todd, for the purpose of securing the repayment of \$4,000. Subsequently another mortgage was executed by her to the same mortgagee for the purpose of securing the sum of \$2,000 additional, made up in part of the interest due on the \$4,000 mortgage and the balance in cash advanced. Subsequently an action was commenced to foreclose both mortgages, which proceeded to judgment, and a decree of foreclosure was rendered, and the premises were sold under that decree, and bid in by the mortgagee. No judgment for deficiency was ever entered up against the mortgagor. The mortgagee, having received the referee's deed, upon seeking to obtain possession was confronted with the deed of the premises, executed in 1862, to said Nelson and his wife; and he found defendant Isaac Nelson (his wife having died) in possession, claiming to own the premises by virtue of said deed. This action was tried before a judge without a jury, and resulted in a judgment for the plaintiff, setting aside the deed from Mrs. Owen to her father and mother, and adjudging the title to have been in her at the time of the execution by her of the mortgages above mentioned, and adjudging that the plaintiff was entitled to the immediate possession of the said

¹ For discussion of principles, see Burdick, Real Prop. § 254.

² Part of the opinion is omitted.

premises. An appeal from that judgment was taken to the general term, where it was reversed, and a new trial granted; but the order granting such new trial did not state that the judgment was reversed on questions of fact.

The first question which arises here is upon the finding of fact made by the trial judge that the deed from Mrs. Owen to her father and mother was never delivered by Mrs. Owen to them, or either of them, nor did she ever authorize any other person to deliver such deed to said grantees, or either of them. * * *

Upon a careful review of this evidence, and of the pleadings and the course of the trial, as manifested in the record, we are of opinion that the finding of the learned judge that there was no delivery of this deed is not supported by any evidence in the case, and is against the existence of a fact which was assumed upon the trial, and charged in the complaint. By the complaint itself, taking it altogether, it is perfectly apparent that it proceeded upon the ground of the execution and delivery of this deed. * * *

The finding of non-delivery being thus an error of law, the general term was right in granting a new trial; and we must affirm the order, unless it shall appear that upon the other findings in the case, assuming there was a delivery of the deed, the judgment of the trial court was necessarily correct. This makes it necessary to look still further into the record; and the first question that meets us is as to the finding of the trial court upon the question of fraud. If there were a delivery of the deed, and no fraud in its purpose, of course that is an end of the case, and it is not necessary to inquire further as to whether the action could be maintained if there were a delivery of the deed, and a fraudulent purpose accompanying it on the part of the grantor. The court found that prior to September, 1862, it was known to her parents that their daughter, Mrs. Owen, then Mrs. Van Vernol, was about to marry, and that in such event she intended to occupy and carry on the farm she owned, through the agency of her intended husband, John Owen. It was further found that the parents and daughter, believing the marriage was hazardous and that indebtedness would arise, and losses be sustained, with a view to entering into the marriage, and engaging in the farming business, and to save the farm to Mrs. Owen, and protect the same from her future creditors, agreed that the daughter should convey the farm to her parents, and they promised to hold the title to the same in trust for her, and she should continue in possession of the premises, and enjoy the proceeds and income thereof; and in pursuance of such agreement the deed was executed; and soon thereafter she went into the occupation of the farm with her husband, engaged in the business of farming, and sustained heavy losses therein, and became totally insolvent. The court further found that the deed was colorable only, and made with intent to defraud the creditors of the grantor, and with intent to

defraud the subsequent mortgagee, the plaintiff's intestate. These findings were duly excepted to by defendant's counsel.

Of course, the same rule holds in this instance as was stated in regard to the finding made by the trial court that there was no delivery of the deed, and, if there be any evidence to sustain these findings of fraud, we are concluded by them. A careful examination of the whole evidence in the case satisfies us that there is none upon which the finding of the learned trial judge can be based. The court found (and the evidence upon that point fully sustains the finding) that at the time when this deed was delivered the grantor owed no debts whatever; and she had, in addition to the farm in question, some personal property and money, which together amounted in value to \$19,000; and the deed was placed on record within four days of its execution. The theory upon which deeds conveying the property of an individual to some third party have been set aside as fraudulent in regard to subsequent creditors of the grantor has been that he has made a secret conveyance of his property while remaining in the possession and seeming ownership thereof, and has obtained credit thereby, while embarking in some hazardous business requiring such credit, or the debts which he has incurred were incurred soon after the conveyance, thus making the fraudulent intent a natural, and almost a necessary, inference; and in this way he has been enabled to obtain the property of others, who were relying upon an appearance which was wholly delusive. Such are the cases cited by the learned counsel for the appellants. But here the grantor was not about to engage in business, within the meaning of that term as used in the cases. She was simply going to live on the farm with her husband, and presumably off the products thereof. She had \$19,000 in personal property, and the farm was then worth about \$6,000. She was wholly free from debt. The deed was placed on record at once. It was four years and four months thereafter before the first of the mortgages was executed to plaintiff's intestate, and eight years and four months before the second was executed. Under such circumstances, we think it is too much to say that there was any evidence at the time she executed the deed that the grantor meant to defraud creditors; on the contrary, no such inference can be drawn. The parties evidently (or at least the mother) were fearful in regard to the marriage, and decided that at least some part of the property which she possessed should be saved to the grantor from the husband's possible future misfortunes. That years after the execution of the deed, which was on record, the grantor, at the request of her husband, should mortgage the farm, and should make an affidavit that she was the owner thereof, however it may show an intent to defraud the mortgagee at that time, does not, we think, show that the purpose of the deed, executed more than four years prior thereto, at a time when

she was largely solvent, was to defraud this mortgagee, or any subsequent creditors, not one of whom was shown to exist earlier than the above-stated time of more than four years from the execution of the deed. She swears distinctly that her purpose was to give the farm freely and wholly to her parents, and the survivor, and she may have felt full confidence in their intention to treat her with kindness. We have not gone at length into the evidence. On the contrary, we have given only a partial review of it; and we feel convinced that it cannot be regarded as furnishing any support for the finding of fraud as made by the trial court.

This conclusion renders it unnecessary to enter upon the examination of any further question in the case. The deed being delivered, and there being no fraudulent purpose which caused its delivery, the title was in the grantees at the time Mrs. Owen assumed to mortgage the farm, and the plaintiffs cannot maintain this action. The equities in favor of the plaintiffs are very strong indeed. Their intestate advanced his money believing his mortgage was a lien on the farm; but he had the opportunity at all times before loaning any money to resort to the record in the clerk's office, and the least attention given thereto would have led to the discovery of this deed. He saw fit to trust to the declarations of Mrs. Owen, and these plaintiffs must sustain a heavy loss in consequence thereof.

The order of the general term granting a new trial must be affirmed, and judgment absolute rendered against the plaintiffs, in accordance with their stipulation, with costs. All concur, except EARL and GRAY, JJ., dissenting.³

II. Restraints Imposed in Creation of Estate ⁴

HARKNESS v. LISLE.

(Court of Appeals of Kentucky, 1909. 132 Ky. 767, 117 S. W. 284.)

Appeals from Circuit Court, Scott County.

"To be officially reported."

Action by James L. Lisle and another against Rufus Lisle, Jr., and others. From the judgment, L. V. Harkness appeals against James L. Lisle and others; James L. Lisle and others appeal against Rufus Lisle, Jr., and others; and Rufus Lisle, Jr., and others appeal against James L. Lisle and others. Affirmed on first and third appeals; reversed on second.

³ And see *Rouse v. Caton*, 168 Mo. 288, 67 S. W. 578, 90 Am. St. Rep. 456, reported herein, ante, p. 108, as to conveyances fraudulent against subsequent attaching creditors.

⁴ For discussion of principles, see *Burdick*, Real Prop. § 258.

CLAY, C.⁵ These appeals involve the construction of the will of Rufus Lisle, a prominent farmer and breeder of thoroughbred stock, who died a resident of Fayette county, Ky., in the year 1891, and the validity of the proceedings of the Scott circuit court decreeing a sale of the tract of land devised by Rufus Lisle to his son, James L. Lisle. The appeals will therefore be considered together.

This action was instituted by James L. Lisle and his wife, Pattie C. Lisle, against their only living children, Rufus Lisle, Jr., and Lillian Lisle, infants over 14 years of age, and their statutory guardian, Victor Bradley, and John H. Payne and E. P. Halley, Sr., trustees under the last will and testament of Rufus Lisle, Sr. The petition charges that by the fifth clause of the will of Rufus Lisle, Sr., the testator devised to James L. Lisle a fee-simple title to the 250 acres of land known as the "Duke place," located in Scott county, Ky., and that the fifteenth clause of said will was an unreasonable restraint upon the fee so devised, and was therefore null and void. * * *

Clause 15 is as follows: "Neither of my children nor the trustee herein named shall sell, convey or in any way charge or incumber the land herein devised, for any purpose whatever during the lifetime of any of my said children." * * *

By that clause the testator's children and their trustees are prohibited from selling, conveying, or in any way charging or incumbering the land devised, for any purpose whatever, during the lifetime of any of said children.

The general rule of law applicable to restraints on alienation may be found in Littleton, § 360, and is as follows: "If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements he hath power to alien them to any person by the law. For if such a condition be good, then the condition should oust him of all power which the law gives him, which should be against reason; and therefore such a condition is void." The exception to this doctrine may be found in Littleton, § 361, which section is as follows: "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., then such a condition is good."

In the well-considered case of *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61, the court said: "Now, neither Littleton nor Coke, nor any of the annotators of Coke upon Littleton, so far as I have been able to discover, has mentioned any such qualification of the general rule laid down by Littleton in section 360, nor anywhere intimated that such a condition against alienation for a particular time, or for a reasonable time, or for any time whatever, would be valid;

⁵Part of the opinion is omitted.

and the same may be said of the other approved English works upon real estate: Blackstone's Commentaries, Sheppard's Touchstone, Bacon's Abridgement, Cruise's Digest, Comyns' Digest, and all other English works which I have been able to examine. And if there is any English decision since the statute *quia emptores*, where the point was involved, in which it was held competent for a feoffor, grantor, or devisor of a vested estate in fee simple, whether in remainder or in possession, by any condition or restriction in the instrument creating it, to suspend all power of the feoffee, grantee, or devisee, otherwise competent, to sell for a single day, I have not been able to find it; and the able counsel for the defendants whose research nothing of this kind is likely to escape, seem to have been equally unsuccessful. In making this statement I do not overlook *Large's Case*, 2 *Leonard*, 82, and 3 *Leonard*, 182, which by some elementary writers and annotators, and in some dicta by judges, and perhaps one or two decisions in this country, seems to have been understood as warranting such a restriction, and upon which all such elementary writers, annotators, and judges, who profess to rest such an opinion upon any authority, rely, but which I propose presently to show decides no such thing as to any vested estate of any kind."

In *Am. & Eng. Encyc. of Law*, vol. 24, p. 867, the rule is thus stated: "There are many dicta, as well as a few direct authorities, to the effect that restraints on alienation for a limited time are valid, but in a number of cases the validity of such restraints has been said to be doubtful; and on principle, and according to the weight of authority, a restriction, whether by way of condition, or of limitation over, or of bare prohibition against any and all alienation, although for a limited time, of a vested estate in fee, whether in possession or remainder, is void. In the case of a contingent remainder, however, or of any other interest not vested, a restriction upon the power of alienation to last as long as the interest remains contingent is valid."

As an inseparable part of this doctrine, it is the recognized rule of law that a devise over of an estate devised in fee is void, and this court has so held in a number of carefully considered cases. *Barth v. Barth*, 38 S. W. 511, 18 Ky. Law Rep. 840; *Clay v. Chenault*, 108 Ky. 77, 55 S. W. 729; *Ray v. Spears' Ex'r*, 64 S. W. 413, 23 Ky. Law Rep. 816; *Humphrey v. Potter*, 70 S. W. 1062, 24 Ky. Law Rep. 1264; *Cralle v. Jackson*, 81 S. W. 669, 26 Ky. Law Rep. 417; *Becker v. Roth* (decided Jan. 29, 1909), 132 Ky. 429, 115 S. W. 761. But this court is committed to the doctrine that a restraint on alienation for a reasonable time is valid. In *Stewart v. Brady*, 3 Bush, 623, the restraint upon alienation was until the devisee arrived at the age of 35 years. In *Stewart v. Barrow*, 7 Bush, 368, the restraint was for a specified length of time. In *Kean's Guardian v. Kean*, 18 S. W. 1032, 19 S. W. 184, 13 Ky. Law Rep. 956, alienation was re-

strained until the devisee reached the age of 28. In *Wallace v. Smith*, 113 Ky. 263, 68 S. W. 131, the devisee was prohibited from selling the property until he reached the age of 35. In *Johnson v. Dumeyer*, 66 S. W. 1025, 23 Ky. Law Rep. 2243, the devisee, a daughter, was restrained from disposing of the property for a period of 20 years after the death of the testator. In *Morton's Guardian v. Morton*, 120 Ky. 251, 85 S. W. 1188, the restraint was during the lives of the joint life tenants. In *Lawson v. Lightfoot*, 84 S. W. 739, 27 Ky. Law Rep. 217, it was provided that the remainder interest should not be sold during the life of the tenant for life. In all of these cases it was held that the restraints upon alienation were for a reasonable time, and therefore valid.

In discussing the question, this court, in the case last cited, speaking through Judge Settle, said: "It must be conceded that the great weight of authority outside of Kentucky is to the effect that, where the fee-simple title to real estate passes under a deed or will, any restraint attempted to be imposed by the instrument upon its alienation by the grantee, or devisee, is to be treated as void, and such is clearly the rule announced by Mr. Gray in his excellent work on Restraints of Alienation; but the contrary view has been adopted by this court in repeated decisions, beginning with *Stewart v. Brady*, 3 Bush, 623, and ending with *Wallace v. Smith*, 113 Ky. 263, 68 S. W. 131. *Stewart v. Barrow*, 7 Bush, 368; *Rice v. Hall*, 42 S. W. 99, 19 Ky. Law Rep. 814; *Kean's Guardian v. Kean*, 18 S. W. 1032, 19 S. W. 184, 13 Ky. Law Rep. 956; *Johnson v. Dumeyer*, 66 S. W. 1025, 23 Ky. Law Rep. 2243. In other words, the accepted doctrine in this state is that restraints upon alienation may be imposed for a reasonable period. This court has, however, never fixed a limit to such restraint, but in *Stewart v. Brady*, supra, it was held that a devise of land to the testator's daughter, with the limitation that it should not be disposed of by her until she became 35 years of age, was reasonable, and in *Kean's Guardian v. Kean*, 18 S. W. 1032, 19 S. W. 184, 13 Ky. Law Rep. 956, it was held that a restriction accompanying a devise of real estate to a son of the testator that he should not have the power to dispose of it until he became 28 years of age was good. If such a restriction may be imposed for the periods indicated by the cases supra, why may it not endure for a longer time, or, as contemplated by the testator in this case, during the life of his widow, the tenant for life of the real estate, the alienation of which is attempted to be restricted? The manifest intention of the testator, R. A. Lightfoot, was to preserve the property intact during the life of the widow, and until it should be taken in possession by the daughters. The widow was beyond middle life when the will was probated, so after all her life expectancy was not then so great as to render unreasonable the restriction placed by the testator upon the right of the devisees to dispose of the property. After a careful consideration

by the whole court of the question presented by the record, it is deemed safer to adhere to the former decisions of the court thereon, though this conclusion has not been reached without misgiving as to its correctness upon the part of a minority of the court; the writer of this opinion being of that minority. It may not, however, be improper to suggest that, notwithstanding the restriction imposed by the will upon the power of the devisees to dispose of the real estate in question, if the deed of general warranty tendered appellant by them should be accepted, they probably could not thereafter recover the property; at any rate, they could not do so without being made to account upon their warranty for the consideration received by them, with interest."

We then come to the question whether or not the restriction contained in the will under discussion is reasonable. Here the testator attempted to impose a restraint upon alienation, not for a specified period of time, nor until the devisee arrived at a certain age, but during the entire lifetime of the devisee. The general rule is that the right of alienation is an inherent and inseparable quality of every vested fee-simple estate. To hold that alienation could be restrained during the lifetime of the fee-simple holder would be to deprive the fee of all its essential qualities. As said by Littleton: "If such a condition be good, then the condition should oust him of all power which the law gives him, which should be against reason." While bound by the former adjudication of this court to adhere to the doctrine that a limitation for a reasonable length of time is valid, we have no hesitation in saying that the limitation attempted to be imposed by the will in question is unreasonable. A testator cannot devise a fee, and then destroy it entirely. We therefore conclude that clause 15 of the will is invalid.

In view of the fact that the deed executed to James L. Lisle by John H. Payne and E. P. Halley, Sr., does not convey a fee-simple estate, and inasmuch as said trustees are before the court, judgment may be entered upon the return of the case declaring that deed void and directing the trustees to make, in conformity with this opinion, a deed to the property in question to James L. Lisle.

On the appeal of L. V. Harkness and of Rufus Lisle, Jr., etc., the judgment is affirmed. Judgment on the appeal of James L. Lisle, etc., is reversed, and cause remanded for proceedings consistent with this opinion.*

* In further recognition of the validity of a restraint on alienation for a reasonable time, see *Stewart v. Brady*, 3 Bush (Ky.) 623 (1868); *Wallace v. Smith*, 113 Ky. 263, 68 S. W. 131 (1902); *In re Dugdale*, 38 Ch. Div. 176 (1888). The weight of authority is, however, that general restraints of alienation even for a limited period are void, in that they deprive the first taker during that time of the inherent power of alienation. See *Potter v. Couch*, 141 U. S. 296, 315, 11 Sup. Ct. 1005, 35 L. Ed. 721 (1896). And see *Burdick*, *Real Prop.* 703.

III. Persons Under Disabilities *

HALL, v. BOLLEN.

(Court of Appeals of Kentucky, 1912. 148 Ky. 20, 145 S. W. 1136, Ann. Cas. 1913E, 436.)

Appeal from circuit court, Knott county.

Action by Linda Hall against Green Bollen. From a judgment for defendant, plaintiff appeals. Affirmed.

CLAY, C. Appellant, Linda Hall, was the owner of about 75 acres of mountain land in Knott county, which she inherited from her father, and upon which she and her husband lived. On August 20, 1901, appellee bought the land, and the deed thereto, at his request, was made to his father, J. R. Bollen.

On October 8, 1908, or about seven years thereafter, appellant, Linda Hall, brought this action against appellee, Green Bollen, to cancel the deed to J. R. Bollen, and to recover the property from appellee. She pleads duress on the part of her husband, the grantee's failure to pay for the property, and mental incapacity as grounds for canceling the deed. On the question of duress, she alleges, in substance, that her husband told her that, if she did not sell the land or let him sell it, he would leave her, or that she could keep the land and he would go; that if she did sign the deed and acknowledge it she did it against her will, and at the time she signed it she did not know what she was doing, or was induced to sign it by the threats of her husband. She further says that at the time the deputy clerk came to take her acknowledgment her little girl was lying a corpse, and had not been dead more than 30 minutes; that she was wholly unable, under the mental strain she was in, to do any business at the time, and does not remember signing and acknowledging the deed. She also says that she never received any benefit from the \$150 which appellee, Bollen, pretended to pay her husband. By amended petition, she further pleaded fraud on the part of appellee, because of the fact that the deed was made to his father, and not to him. Appellee denied the allegations of the petition, and also pleaded the five-year statute of limitations. Evidence was heard, and, upon final submission, the petition was dismissed. From that judgment, this appeal is prosecuted.

Appellant testifies that she did not know for some time after she and her husband made the deed that it was made to J. R. Bollen instead of Green Bollen. She did not think the clerk really explained the deed to her. Remembered signing something, but was so "pestered" over the death of her child, which had occurred a few min-

* For discussion of principles, see Burdick, Real Prop. §§ 258-264.

utes before, that she did not know what it was. The death of her child occurred just a short time before the deputy clerk, her husband, and Green Bollen came to the house. Her husband had often talked of selling the land, but she had told him she did not want to sell it; whereupon he replied, "By God, you go, and I'll stay." Her husband was a very "fractious" man, and she generally did what he told her to do. He never told her about selling the land until after the clerk came to take the acknowledgment. He told her he wanted her to sign it; but she tried to put him off to some other time. He then "frowned his face," and made a motion for her to sign it, and she did so. She then signed it against her will. She was under great mental strain at the time. On cross-examination, she stated that she did not remember what the clerk said to her. She admitted that her husband received some money and some live stock, which he went through with for the benefit of the family. Appellant's mother testifies that she was present when appellant signed the deed. It was about an hour after the child died. The child had been ill for a long time, and she saw that it was perishing, and she was glad that death came. If the clerk did read or explain the deed to her, it was past her recollection. Appellant was in great mental grief, and she did not think appellant was capable of doing any business. On cross-examination, she stated that she never lost her mind in the presence of grief, and did not suppose appellant did. When the clerk took the acknowledgment, he took appellant aside. Her husband walked around the house. The clerk asked appellant if she was signing the deed of her own free will, and appellant said, "Humph."

S. J. Gayheart testifies that appellant's husband, Green Bollen, and the deputy clerk came to appellant's house just a few minutes after the child died. People there said that Green Bollen had bought the land of Elijah Hall, and had come to get the deed fixed. He does not know whether appellant was grieving at the time they came; but she had been. Was of the opinion that the land was worth about \$200 at that time. Previous to this time, he had bought of appellant and her husband 25 or 30 acres, and the best part of the land, for \$50, or about \$2 an acre.

According to the evidence for appellee, as given by appellee, the deputy clerk, and other witnesses, appellee was approached by appellant's husband and asked to purchase the land. He agreed to take it at the price of \$180. They then started for appellant's home. On the way, they were informed of the child's death. They went to the house. The deputy clerk took his seat on the porch and wrote the deed. When the deed was completed, the clerk required both appellant's husband and appellee to leave. They went around the house. The nature and effect of the instrument was explained to appellant, and she thereupon acknowledged it as her voluntary act and deed. According to the appellee, the deed was made to his father, because

he was young at the time, and had not married. His brother, however, says that the deed was made to his father because his father furnished the money. After the deed was prepared, signed, and acknowledged by the parties, appellee paid appellant's husband some cash, and then delivered to him a cow and a yoke of oxen, and paid the balance of the purchase price by discharging a mortgage lien on the property. Appellant's husband did not indicate in any way that he was compelling appellant to sign the deed; and, while she had been crying some, she was perfectly composed at the time the transaction was closed. Under the agreement, appellant and her family could remain on the land until in the fall. They did remain there until that time, and then moved into a house about three miles distant. Appellee put about \$600 worth of improvements on the premises, and made a good farm out of it. The farm was worth about \$180, the price paid.

We deem it unnecessary to decide whether or not the alleged acts of appellant's husband constituted duress. It is sufficient to say that the appellant may not, in this action, avail herself of such plea. In the first place, the evidence utterly fails to show that appellee or his father, the grantee in the deed, had any knowledge of the alleged acts of the husband. Being an innocent purchaser for value of the property in question, without knowledge of any duress exercised over appellant by her husband, he will be protected in his purchase. *Deputy v. Stapleford*, 19 Cal. 302; *Hall v. Patterson*, 51 Pa. 289; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147; *Rogers v. Adams*, 66 Ala. 600; *Line v. Blizzard*, 70 Ind. 23.

In the next place, it is a well-settled rule that, where it is sought to avoid a contract because of duress, the person seeking such avoidance must proceed within a reasonable time after the removal of the duress. If he remain silent for an unreasonable length of time, or if he keep property which he may have acquired under the contract, or otherwise recognize the validity of the contract, he will be held to have elected to waive the duress and ratify the contract. Thus, in the case of *Eberstein v. Willets*, 134 Ill. 101, 24 N. E. 967, where it was sought to avoid a deed for duress, an unexplained delay of over three years in bringing the action was held sufficient to ratify the deed. In *Davis v. Fox*, 59 Mo. 125, the same rule was applied, where there was a delay of seven years. In *Gregor v. Hyde*, 62 Fed. 107, 10 C. C. A. 290, a delay of three years in bringing the suit was held sufficient to constitute a ratification. In *Schee v. McQuilken*, 59 Ind. 269, where a wife sought to avoid a lease on the ground of duress imposed upon her by her husband, and no steps were taken to avoid the lease until three years and a half after its execution, it was held that her ratification of the lease would be inferred. In this case, the live stock, which constituted a part of the purchase price, was delivered to appellant's husband. She recognized the cow as her

property, and stated that no officer could take it under an execution for her husband's debt. The trade was made in August. She and her husband lived upon the land for several weeks, and then moved to a place about three miles distant. Thereafter appellee, with appellant's knowledge, put valuable improvements upon the land. Notwithstanding these facts, she delayed bringing suit for over seven years. Under the circumstances, her conduct amounts to a ratification of the contract.

The evidence utterly fails to show such mental incapacity on the part of appellant as to prevent her from knowing and appreciating the nature and character of the transaction. There is not only evidence to the effect that she was informed some time before their arrival that the parties were coming to get the deed, but she herself admits that after their arrival she was apprised of the purpose of their visit. Even appellant's mother testifies that the deputy clerk asked appellant if she was signing the deed of her own free will, and the weight of the evidence shows that the nature and effect of the instrument was fully explained to appellant. While the time was certainly inopportune, and showed a lack of delicacy on the part of the parties thereto in asking appellant to execute a conveyance just after the death of her child, this fact, coupled with her distress of mind, is not sufficient to justify the cancellation of the deed. That she was in distress was doubtless true; but it is equally true that in executing the deed she knew and fully appreciated the nature and effect of the transaction.

There is nothing to show that any fraud was practiced upon appellant. There is no proof that the price paid for the land was less than its actual value. Appellant admits that the cash payment and the personal property were, with her knowledge, spent for the benefit of the family. Indeed, the only fraud relied upon is the fact that the deed was made to appellee's father, instead of to appellee. The rights of no creditors being involved, the purchaser of land may have the deed made to any one he pleases. In the absence of other circumstances tending to show fraud, the mere fact that the grantor executes and acknowledges a deed to the purchaser's father, though he believes the purchaser is the grantee therein, will not amount to a fraud upon the grantor, where the grantor receives the benefit of the full purchase price.

Judgment affirmed.

CREATION OF INTERESTS IN LAND BY POWERS

I. Powers of Appointment¹

HEINEMANN v. DE WOLF.

(Supreme Court of Rhode Island, 1903. 25 R. I. 243, 55 Atl. 707.)

Action by Emily M. Heinemann and others against James F. De Wolf and others for the construction of a will. Judgment for complainants.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ. TILLINGHAST, J. The real estate described in this bill of complaint having been sold by the commissioner who was appointed for that purpose, the same is now before the court for the purpose of determining as to the ownership of one-twelfth part of the proceeds of the sale, in accordance with a decree heretofore entered in the case. This one-twelfth part is claimed by the respondent James De Wolf Perry, to whom, after the death of Mrs. Perry, her husband, Raymond H. Perry, by deed dated September 13, 1900, conveyed to his brother, said James De Wolf Perry, "all his interest in the estate of his late wife, Ellen M. Perry, deceased, under and by virtue of her will, or otherwise, whether real or personal, and of whatever kind and nature," in trust for certain purposes mentioned in said deed. And he, said James De Wolf Perry, claims that said one-twelfth passed to Raymond H. Perry, under the residuary clause of Mrs. Perry's will, and now belongs to him by virtue of said conveyance. This one-twelfth part of the proceeds of the sale of said real estate is also claimed by the Fidelity Insurance, Trust & Safe Deposit Company, of the city of Philadelphia, as trustee for the children of Mrs. Perry; the contention in their behalf being that it did not pass under the residuary clause of Mrs. Perry's will, and hence was not included in said conveyance. The title to this one-twelfth part of said proceeds therefore depends upon the construction which shall be put upon the fourth clause of the will of said Ellen M. Perry. And the specific question raised may be stated thus: Does the fourth paragraph of the will of Ellen M. Perry include and dispose of the one-twelfth interest of the real estate of her father, Charles H. Dabney, of which she became seised in fee simple on the death of her sister Frances Elizabeth Rhett without issue?

Charles H. Dabney died December 15, 1879, leaving a last will and testament, which was duly admitted to probate in Philadelphia, Pa.,

¹ For discussion of principles, see Burdick, Real Prop. § 268 et seq.

on August 6, 1880, and was also filed and recorded in Bristol, R. I., on March 10, 1900. By said will he left the bulk of his estate in trust for the benefit of his wife, Ellen Maria Dabney, for life, and after her in trust for the benefit of his four daughters, namely, Ellen Maria De Wolf, wife of James F. De Wolf, Jr., of Bristol, and who, after the death of said James, married Raymond H. Perry; Emily M. Heinemann; Frances Elizabeth Dabney, who afterwards married Julius Rhett; and Mary F. Payson.

So far as the question at issue is concerned, the material parts of Mr. Dabney's will are contained in the first and second codicils thereto, which read as follows:

(1) "If either of my daughters shall die leaving no children or issue of a deceased child, then and in every such case it is my will that the portion which by said will would go to such daughter's children or issue of her child, if living, shall go to her sisters then surviving, and the issue then living of any of her sisters then deceased, share and share alike, to each sister, and the issue of a deceased sister taking its parent's share; to them severally for their own use forever.

(2) "It is my will and I order and direct that if either of my daughters shall die, leaving children her surviving, or leaving a child and issue of a deceased child, her surviving, such daughter is empowered hereby to divide into such shares or portions, the whole or any part of my estate, which by said will and former codicil would go to her children, and to give, grant, devise, bequeath or appoint the same to and among such children and issue or any of them in such proportion, ratio or shares, equal or unequal, as she shall deem fit."

Mrs. Dabney died a number of years ago. Mrs. Rhett died without issue on January 2, 1898, whereby the one-fourth of the estate held in trust for her under her father's will vested in her three surviving sisters, namely, Mrs. Perry, Mrs. Heinemann, and Mrs. Payson, one-third in each (that is, one-twelfth of the whole estate), in fee simple.

Mrs. Perry (formerly Mrs. De Wolf) died May 28, 1899, leaving, surviving her, her second husband, Raymond H. Perry, and three children by her first husband, and leaving a will dated July 20, 1898, which was duly admitted to probate. The fourth paragraph of this will, in so far as it is material to the question raised, reads as follows:

"For the purpose of executing the power which is vested in me under the will and codicil of my father, Charles H. Dabney, I give, devise and bequeath the estate which I am authorized by said will and codicil to appoint, to my children who may be living at the time of my death and the issue of any of my children who then may be deceased, such issue taking the share which their parent would have taken if living, in equal shares and portions, but it is my will that the estate thus appointed shall be held by the said Fidelity Insurance,

Trust & Safe Deposit Company, of the City of Philadelphia—In trust," etc.

On the part of said trust company, representing the children of Mrs. Ellen M. Perry, it is contended that by the fourth clause of her will she intended to pass all her interest in said estate to them, and not leave it to pass to her husband, as a part of her general residuary estate. And it is argued that the language of said clause appropriately expresses this intention, and is apt and sufficient to include said one-twelfth of the estate. This contention is based mainly upon the claim that Mrs. Perry took this one-twelfth part under the first codicil of her father's will, and by the second codicil was given power to dispose thereof by appointment among her children or issue, only. We are unable to assent to this contention. Under the first codicil of Mr. Dabney's will, the share of any daughter dying without issue passed to her sisters then surviving, and the issue of any deceased sister equally—the issue of a deceased sister taking its parent's share—"to them severally for their own use forever." Upon the death of Mrs. Rhett, therefore, one-fourth of her father's estate was discharged of the trust created by his will, and vested absolutely in the three surviving daughters, namely, Mrs. Heinemann, Mrs. Payson, and Mrs. Perry; each taking one-third of the one-fourth, or one-twelfth of the whole. And this part of said estate being vested in Mrs. Perry in fee simple, of course she could dispose of it by will or otherwise, as she saw fit.

As showing that the one-twelfth in question does not belong to the children of Mrs. Perry, it is to be observed that the property covered by the first codicil of Mr. Dabney's will was not to go to the children of a surviving sister, but only to the children of a deceased sister. And at the time of the death of Mrs. Rhett, Mrs. Perry was a surviving, and not a deceased, sister. It is also to be observed that the power of appointment conferred by Mr. Dabney under the second codicil of his will is limited to such portions of his estate as would pass under the first codicil to the children of a deceased daughter who should survive her. Upon the death of Mrs. Rhett without issue, therefore, it would seem to be clear that her surviving sisters, and not their children, were entitled to, and became the absolute owners of, the one-fourth part of the estate which she took under her father's will. Moreover, as pertinently argued by counsel for Mr. James De Wolf Perry, "If Mr. Dabney intended that the power given by his second codicil should in any way limit the absolute estate which might vest in Mrs. Perry, then the limitation was void as being repugnant to the absolute gift. But the clearly expressed intention of Mr. Dabney was to empower his daughters to appoint the shares their children should take in that part of his estate which went to such children under his will, leaving his daughters free to do what they wished with their own estate."

It appearing, then, that the interest in question passed to Mrs. Perry absolutely on the death of her sister, Mrs. Rhett, we come now to consider the question hereinbefore suggested, namely, whether she disposed of said interest by the fourth clause of her will. We think this question must be answered in the negative. In this clause the testatrix uses the expression, "the estate which I am authorized by said will and codicil to appoint." She thereby clearly restricted herself to the power of appointment contained in her father's will. The language used plainly shows that this was the only thing she had in mind; that she was not attempting to dispose of her own estate, but only of that which was covered by the power. And to hold that anything outside of the exercise of the power was intended to be accomplished by said clause would be to force the language used beyond its natural meaning. The term "appoint," particularly, shows that the testatrix did not intend to dispose of her own property, as this term is never used to convey one's absolute estate. The use of the word "power" also shows that she did not intend to include her own estate held by her in fee, as a power, when given by will, contemplates not an estate in one's self, but simply the authority to give title thereto. And in the absence of anything to show an intention to the contrary, it is to be presumed that the testatrix used the words referred to in their strict legal sense and meaning. *Chapin v. Hill*, 1 R. I. 446; *Bailey v. Brown*, 19 R. I. 669, 36 Atl. 581.

We not only fail to find anything in Mrs. Perry's will to indicate that the technical words referred to were not used in their strict legal sense, but, on the contrary, the language used by her in the fifth paragraph, in which she refers to the fourth paragraph as disposing of that estate "over which I have a power of appointment under the will of my father," shows that she well understood and clearly appreciated the distinction between her own property and that over which she had and was exercising the power of appointment. In this connection it is pertinent to observe that when she executed her will, on July 20, 1898, her sister Mrs. Rhett had been dead for more than six months. And it must be presumed that she knew and well understood at that time that she had an absolute estate in one-twelfth of the property included in the trust created by her father's will. And the fact that she failed to use any language in said fourth clause which would be apt and pertinent to convey any estate excepting that to which she specifically refers shows that she did not intend to include any of her own estate therein. And of course the law is "that by the simple exercise of a power the donee will pass only the interest of the person creating it, and not any interest or franchise of his own." 1 Sug. on Powers, 293. For "a power of appointment," as well defined by Jessel, M. R., in *Freemantle v. Clement*, 18 L. R. (Ch. Div.) 504, "is a power of disposition given to a person over property not his own, by some one who directs the mode in which that power shall be exercised by a particular instrument." And where the donee

of a power makes a disposition of the subject-matter thereof in express execution of the power, as in the case under the clause now under consideration, such disposition, in the absence of anything in the context showing a contrary intention, should be restricted to an execution of the power so as not to affect the donee's individual estate. 22 Am. & Eng. Ency. L. (2d Ed.) 1115; *Moore v. Humpton*, 1 Whart. (Pa.) 433; *Beardsley v. Hotchkiss*, 96 N. Y. 212.

We think the intention of the testatrix, by the fourth clause of her will, to exercise the power of appointment only, and not to dispose of any of her own absolute estate, is so apparent and clear as not to be fairly susceptible of any other interpretation. And hence, under the well-settled rule in relation to the execution of powers (see *Blagge v. Miles*, 1 Story, 426, Fed. Cas. No. 1,479; *Cotting v. De Sartiges*, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367; *Mason v. Wheeler*, 19 R. I. 21, 31 Atl. 426, 61 Am. St. Rep. 734), the interest in question did not pass to said trust company, but did pass to her husband under the residuary clause of her will. We therefore decide that said one-twelfth interest now belongs to the respondent James De Wolf Perry, by virtue of the deed of conveyance to him from Raymond H. Perry, dated September 13, 1900, hereinbefore referred to.²

² As to the capacity of a married woman to execute a power, see *Stearns v. Fraleigh*, 39 Fla. 603, 23 South. 18, 39 L. R. A. 705 (1897), reported ante, p. 248. See, also, *Appleton's Appeal*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925 (1890), reported ante, p. 356, as to the application of the rule of perpetuities against powers.

DEEDS AND THEIR REQUISITES

I. Deed Defined ¹

See Jackson ex dem. Gouch v. Wood, ante, p. 527.

II. Requisites of Deeds ²

1. CONSIDERATION

VINCENT v. WALKER.

(Supreme Court of Alabama, 1891. 93 Ala. 165, 9 South. 382.)

Appeal from chancery court, Madison county; Thomas Cobbs, Chancellor.

Bill in equity by Louisa J. Vincent against E. T. Walker and others, to cancel a deed executed by complainant. Complainant appeals from a decree dismissing the bill.

McCLELLAN, J. On a former bill by the present appellant, complainant below, in respect of the facts and subject-matter involved now, it was held that the transaction between Louisa J. Vincent and E. T. Walker, in which the former executed a deed absolute in its terms to the latter, and took from him, in a separate writing, an undertaking to reconvey to her the land in controversy upon repayment to him of the consideration recited in the deed within a certain time, was a conditional sale, and not a mortgage, as the grantor insisted in that bill. So considered as a sale by Mrs. Vincent, the property belonging to her statutory separate estate, it was further decided that she, being joined therein by her husband, was competent to so contract in relation to and to convey the land. Vincent v. Walker, 86 Ala. 333, 5 South. 465. The time within which Mrs. Vincent had the privilege of repurchasing having elapsed, and the privilege not having been exercised, the conveyance is shorn of the defeasance which originally attached to it, and must now be considered as if it had been an absolute deed ab initio, executed with all the formalities essential to the divestiture and passing of the statutory separate estate of a married woman in land. It is so treated in the present bill, which proceeds in the name of Mrs. Vincent for its cancellation as a cloud on her title, on the ground of its invalidity by reason of facts extraneous to the paper.

The infirmities laid, or attempted, in one way or another, to be laid,

¹ For discussion of principles, see Burdick, Real Prop. § 281. For a form of a warranty deed, see Simons v. McLain, 51 Kan. 153, 32 Pac. 919 (1893), reported herein, ante, p. 169. As to the nature and effect of a quitclaim deed, see Johnson v. Williams, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243 (1887), reported herein, ante, p. 461.

² For discussion of principles, see Burdick, Real Prop. § 282.

against the deed, are three: (1) That its execution was induced by a resort to undue influence, persuasions, etc., on the part of the grantor or beneficiaries; (2) that its consideration is tainted by an agreement in composition of a felony; (3) that it was executed without consideration. Of these the first and second grounds of attack may be summarily dismissed without further discussion than to say that the facts in respect to them are not sufficiently alleged, and could not be found to exist on the evidence in this record, had they been adequately pleaded. The real and only points in the case, therefore, are whether the complainant may be let in to show, and has shown, that the deed is not supported by a consideration.

And, first, was there any consideration? In our opinion there was not. The facts were these: One Bradley had been tax collector of the city of Huntsville. Appellee Walker, Frank B. Gurley, and another were sureties on his official bond. Gurley had indemnified his co-sureties against loss on the undertaking. Bradley made default in his payments to the city. The amount of his deficit was supposed, it seems, to be about \$2,000. The sureties were notified of the defalcation, and recognized their liability. Gurley and Mrs. Vincent were brother and sister. Bradley married a daughter of Mrs. Vincent. Walker married her niece. Mrs. Vincent was not at any time or in any manner bound for Bradley's deficit. Gurley alone, by reason of his indemnification of his co-sureties, was ultimately liable for the whole of it. At his suggestion, Mrs. Bradley went to her mother, and induced her to execute this deed for the purpose of raising \$2,000 with which to pay the sum Bradley owed the city. The deed was made to Walker according to an arrangement between him and Gurley. Gurley deposited \$2,000 in bank to Walker's credit. Against and for this amount Walker drew a check in favor of Mrs. Vincent, to the end that she should apply its proceeds to the payment of Bradley's deficit. To that end she at once, and in consonance with the general arrangement, indorsed and delivered the check to Bradley. He collected the money on it, and, the deficit turning out to be only \$1,750, paid that sum to the city of Huntsville, and paid the balance of \$250 to Frank B. Gurley.

It is at once manifest from these facts, as to which there is really no conflict in the evidence, that Mrs. Vincent was not to receive, and did not in fact receive, one cent of the recited consideration for her property. It is clear that the sole purpose was to reimburse Gurley money which he alone was ultimately liable to pay, and for which she was in nowise responsible, and that even this purpose has been exceeded in Gurley's favor in such sort that he has received \$2,000 worth of Mrs. Vincent's property in reimbursement to him of \$1,750 expended by him in the satisfaction of his own debt. So not only has Mrs. Vincent received no consideration of benefit to her, and not only does the transaction involve no consideration of detriment to Gurley,

but the latter has actually been paid \$250 as a bonus for the liquidation of his own liability. It will not do to say that when the check was delivered to Mrs. Vincent it was a payment to her, and that the disposition she made of it was a matter with which Gurley and Walker had nothing to do.

There is no force in the suggestion that, if this was not a payment to her, every married woman who made a sale of her land, and received money therefor, could assert that a third person reaped the benefit of it, and upon that ground come into equity with unclean hands, and avoid her conveyance. There is no analogy between the two cases. Mrs. Vincent did not receive this money or this check to her own use. She was a mere conduit between Gurley, the debtor, and the city of Huntsville, the creditor. She could not have kept the money or made use of it. She was a trustee, nothing more or less, and as such had undertaken to indorse and deliver the check to Bradley, to be used by him in paying a debt of the real drawer of the paper; and, had she failed to so indorse and deliver, the powers of a chancery court would have been entirely adequate to have compelled the execution of the trust. The disposition which she made of the check was not a matter with which Gurley and Walker had nothing to do; but, on the contrary, it was the precise disposition she had bound herself to them to make of it. She received the check alone on the condition that it should be used in the way in which it was used; and she could not have devoted it, or the proceeds of it, to any other end. Her hands are exceedingly empty, but not "unclean." They would have been full, but by no means clean, had she diverted this money from the purposes for which alone it was paid to her. We are quite assured of the soundness of the conclusion we have announced, that this deed is wholly unsupported by any consideration either of benefit to the grantor or detriment to the grantee or beneficiaries. To cancel it would be to give to Mrs. Vincent that to which she is clearly entitled, and to take nothing from Gurley and Walker to which, in equity and good conscience, they have any claim.

It is a well-established general rule that the grantor in a deed which acknowledges the receipt of a valuable consideration is estopped, as against the grantee, to say no valuable consideration was in fact received, though the character and amount of the consideration may, even between the parties to the instrument, be shown to be other than as recited. 5 Amer. & Eng. Enc. Law, pp. 436, 437; 3 Brick. Dig. p. 299, § 36 et seq.; *Bank v. McDonnell*, 89 Ala. 434, 8 South. 137, 9 L. R. A. 645, 18 Am. St. Rep. 137. But this rule cannot apply to a married woman so as to prevent her showing the absence of all consideration for her deed. With respect to a married woman under such disabilities as rested on her under the statute of force at the time of this transaction, the rule is that only a valid deed—such deed as the statute authorized her to execute—can raise up any estoppel against her. "It is clear that a married woman under disabilities can-

not be estopped just as if she were *sui juris*, and the only way of determining in what cases she may be estopped is to ascertain—First, whether the alleged estoppel grows out of a judgment, deed, contract, or tort; and, second, whether such judgment, deed, contract, or tort is binding as such on the married woman.” 14 Amer. & Eng. Enc. Law, pp. 637, 638; *Alexander v. Saulsbury*, 37 Ala. 375–378.

The statute did not confer on Mrs. Vincent and her husband capacity to dispose of her land as was attempted in this transaction. They had power to sell it, but not to mortgage it, and not to give it away. The statute contemplates and provides for only a “sale,” in the legal sense of the term,—a transfer of it for a valuable consideration,—and, in terms, makes provision for the uses and ends to which the consideration received shall be devoted. The proceeds of the sale were to be invested in other property for the wife, or used in “such manner as is most beneficial for the wife.” Code 1876, §§ 2707, 2709. In other words, as said by Brickell, C. J.: “The power conferred by the statute and the constitution (and it is strictly, narrowly, enabling) is to sell, converting the thing sold into money or its equivalent, and no other power can be exercised.” *Shulman v. Fitzpatrick*, 62 Ala. 571; *Peeples v. Stolla*, 57 Ala. 53. The transaction here not being a sale within the enabling statute cited, the recital in the deed acknowledging the receipt of a valuable, and, for aught that appears, an adequate, consideration, does not estop Mrs. Vincent to show that there was no consideration, as it would do had she been *sui juris*. *Harden v. Darwin*, 77 Ala. 472, 482; *Wilder v. Wilder*, 89 Ala. 414, 418, 7 South. 767, 9 L. R. A. 97, 18 Am. St. Rep. 130. And, in our opinion, as we have said, she has clearly shown that there was no consideration for the deed. It is void, and must be canceled, as a cloud on her title, as prayed in her bill.

Accordingly, the decree of the chancellor is reversed, and a decree will be there rendered adjudging the invalidity of the deed, and directing it to be delivered up to the register of the Madison chancery court, and be canceled by him. Reversed and rendered.³

III. Description of Property Conveyed ⁴

HOBAN v. CABLE.

(Supreme Court of Michigan, 1894. 102 Mich. 206, 60 N. W. 466.)

Error to circuit court, Mackinac county; C. J. Pailthorp, Judge.

Ejectment by James Hoban against James F. Cable to try title to a parcel of land on Mackinac Island. Judgment for plaintiff, and defendant brings error. Affirmed.

³ As to the sufficiency of consideration in a deed, see *Fuller v. Missroon*, 35 S. C. 314, 14 S. E. 714 (1892), reported herein ante, p. 31.

⁴ For discussion of principles, see *Burdick*, Real Prop. § 284.

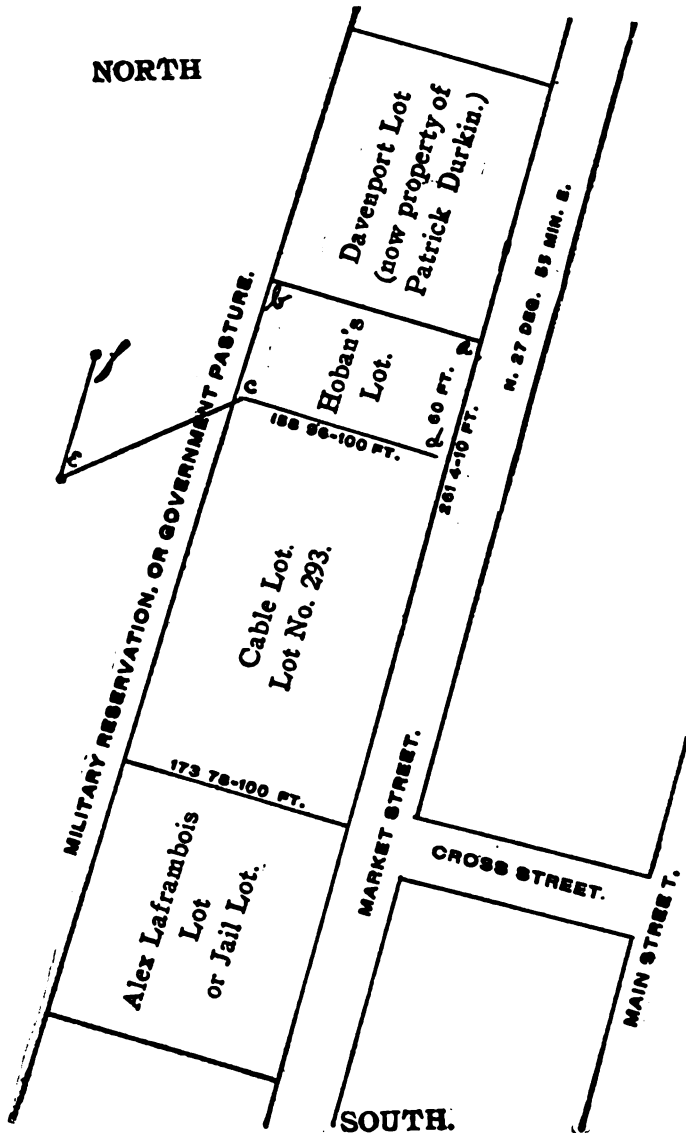
MONTGOMERY, J. This is an action of ejectment. The trial was had before a jury, and a verdict rendered for the plaintiff. The defendant brings error. The assignments of error are numerous, but have been carefully grouped by the appellant's counsel, so that the questions may be dealt with under a few heads. The following diagram will furnish an aid to an understanding of the points involved.

The record contains the substance of all the testimony, from which it appears that plaintiff derived title from the heirs of Laurie McLeod, to whom a conveyance was made by Eliza McLeod in 1862, Eliza McLeod being then in possession, and the apparent owner. The defendant claims title by adverse possession, and also claims that by a subsequent conveyance to him by Eliza McLeod of lot No. 293 the title passed to him, and in this connection contends that the deed to Laurie McLeod contained no sufficient description of any property, and that the record of a deed was, therefore, no notice to him of any right in Laurie McLeod.

1. In the course of the trial the plaintiff introduced a purported record of a deed from one Charles C. Grove and wife to Eliza McLeod. The record of this deed was objected to on the ground that, although the deed purported to have been executed in New York, there was no seal attached to the certificate of the clerk of the court. The objection was a valid one, under the decision of this court in *Pope v. Cutler*, 34 Mich. 150. But the error was not prejudicial. If the deeds in plaintiff's chain of title contained a sufficient description, he showed conveyances from one in possession for many years, and this was sufficient to establish a prima facie title, which is disputed in no way unless the defendant has acquired a title by adverse possession. *Gamble v. Horr*, 40 Mich. 561; *Bennett v. Horr*, 47 Mich. 221, 10 N. W. 347; *Van Den Brooks v. Correon*, 48 Mich. 283, 12 N. W. 206; *Covert v. Morrison*, 49 Mich. 133, 13 N. W. 390; *Cook v. Bertran*, 86 Mich. 356, 49 N. W. 42.

2. As the deed to Laurie McLeod was first recorded, and as defendant claims it in fact read when executed, the description of the land was as follows: "Beginning on Market street, between the lot herein intended to be conveyed and a lot confirmed by the government of the United States to Ambrose Davenport; thence north, sixty-two degrees fifteen minutes west, 158.96 feet; thence south, thirty-one degrees west, sixty feet; thence south, sixty-two degrees fifteen minutes west, 158.96 feet, to Market street; thence along said street north, twenty-seven degrees forty-five minutes east, to the place of beginning." Was this a sufficient description, or must the deed be treated as a nullity? The starting point is definite. The first line, to point b, is also certain, as is the line between points b and c. But, if the direction of the next line is followed as given in the instrument, the terminus is at e, and the line named in the succeeding portion of the description would end at f. But the course given after reaching

point c is not the only means of identification adopted. That line is described as terminating at Market street. If we exclude the words indicative of the direction of the line, and carry the line in the most direct course to Market street, we not only have a line answering to the other terms of the deed, but one which, with its extension, incloses something, which is, by the terms of the deed, "a lot intended to be conveyed," and which, to answer the terms of the portion of the description relating to the starting point, must lie next to "the lot



confirmed by the government to Ambrose R. Davenport." To make this clearer, the deed contains the statement that from the terminus of the third line named in the description the boundary shall extend along Market street to the place of beginning. We think the intent of the grantor is clear, and that the deed is not a nullity for want of a sufficient description. See *Anderson v. Baughman*, 7 Mich. 72, 74 Am. Dec. 699; *Cooper v. Bigly*, 13 Mich. 463; *Dwight v. Tyler*, 49 Mich. 614, 14 N. W. 567. A number of defendant's points depend upon this, and it becomes unnecessary to treat in detail some of his assignments of error. The deed being valid to convey the land, the record was notice to subsequent purchasers.

3. One of the conveyances under which plaintiff claims contained a description as follows: "A lot sixty feet wide on Market street and 128.90 feet deep, being the north end of lot 293 in the village of Mackinac." This is claimed to be insufficient, but we think there is no mistaking the land intended to be conveyed.

4. As above stated, the defendant interposed the defense of adverse possession. In order to meet this, plaintiff was allowed to prove by one R. McLeod, in whose family one of the minor heirs of Laurie McLeod lived, that the plaintiff occupied the premises under an agreement made by him with said R. McLeod as an assumed representative of the minors, to the effect that defendant might occupy the land in question in consideration of his paying the taxes thereon. Complaint is made of this on the ground that R. McLeod was not shown to have had authority to act for the minors. But we think this fact immaterial. If the defendant in fact entered into the possession of the lands under such an engagement as is claimed, he did not enter in hostility to the minor heirs, and for this purpose the testimony was admissible. In the same connection it is urged that the agreement in question only covered the fenced portion of the premises, which was something less than the whole, another portion being used for a driveway. But while it is true that certain portions of the testimony might bear this construction, we think there is no mistaking the tenor of the agreement, or that it related to the land deeded to Laurie McLeod. The defendant's denial did not relate to the question of quantity, but was absolute. His claim was that he had no notice of the conveyance to Laurie McLeod, and occupied the whole of the land in question in hostility to plaintiff's grantors, while plaintiff's theory was that he had notice of this adverse right, and occupied in subordination to their title. The two theories were fairly submitted to the jury.

5. The court permitted an amendment on the trial, narrowing the plaintiff's claim. This could not have prejudiced the defendant, and was proper. *Bringham v. Railroad Co.*, 78 Mich. 572, 44 N. W. 414. We think no error to the prejudice of defendant was committed. The judgment will be affirmed, with costs, and the case remanded.

LONG, J., did not sit. The other justices concurred.

DODD v. WITT.

(Supreme Judicial Court of Massachusetts, 1885. 139 Mass. 63, 29 N. E. 475, 52 Am. Rep. 700.)

Report from superior court, Berkshire county; Gardner, Judge.

Writ of entry by Daniel Dodd against Ivory Witt and others. Verdict directed for plaintiff, and case reported to the supreme court for determination. New trial ordered.

FIELD, J. The demanded premises are a strip two rods wide on the westerly end of the lot described in the demandant's deed. The demandant derives title from Reuben Whitman, who in May, 1866, conveyed the premises to Thomas H. Lidford by a description as follows: "Commencing on the road at the south-east corner of the land that I gave D. H. Raymond a bond to convey; thence west 22 deg. 30 min. N., ten rods; thence south, 22 degrees 30 minutes west, four rods; thence east, 22 degrees 30 minutes S., ten rods; thence south on the road to the place of beginning." The descriptions in the mesne conveyances are substantially the same. The road was four rods wide, and Reuben Whitman, when he executed his deed, owned the fee of it. The deed therefore conveyed the land to the center line of the highway. *Peck v. Denniston*, 121 Mass. 17; *O'Connell v. Bryant*, Id. 557.

The tenants contended that by the construction of the deed the side lines of the demanded premises extended ten rods from the center line of the highway, or eight rods from the westerly side of the highway; or, if this were not the true construction, that there was an ambiguity in the description; and they offered "John Lidford, father of said Thomas H. Lidford, as a witness to prove that at the time of the execution of the above mentioned deed from Reuben Whitman to Thomas H. Lidford, the said witness was present; and that said Whitman measured on the west line of the road above mentioned westerly eight rods, and fixed a monument at the north-west corner of the lot; thence southerly four rods to the south-west corner, and fixed a monument; thence southerly eight rods to the west side of the highway; thence on the highway to the place of beginning. That his son Thomas H. Lidford and himself built a fence across the west end of said lot from corner to corner, as indicated by the monuments thus erected, at the time of said deed to Lidford, which fence remained until after the demandant went into possession under his deed. That the land included within said measurement was all that Thomas H. Lidford purchased, as he understood it at the time, except that he was told by Whitman that his grant really extended to the center of the highway, which he was told was four rods wide." The court excluded this testimony, and ruled "that there was no ambiguity in the deeds offered by the plaintiff; that the monument called

for 'on the road' was by the side of the road, and not the center of the road;" and directed the jury to render a verdict for the demandant. This is a ruling that, by the construction of the deed, the lines extended 10 rods from the westerly side of the road.

In *Peck v. Denniston*, supra, Chief Justice Gray says: "The general rule is well settled that a boundary on a way, public or private, includes the soil to the center of the way, if owned by the grantor; and that the way, thus referred to and understood, is a monument which controls courses and distances, unless the deed by explicit statement or necessary implication requires a different construction. *Newhall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790; *Fisher v. Smith*, 9 Gray, 441; *Boston v. Richardson*, 13 Allen, 146; *White v. Godfrey*, 97 Mass. 472; *Motley v. Sargent*, 119 Mass. 231." Not one of these cases, however, considers the construction to be given to a deed in which a highway is a point of departure for a measured line. In *Newhall v. Ireson*, supra, the line was "running northerly seven poles to the county road, and from thence, upon the road, twenty-two poles, to the first-mentioned bound." The seven rods terminated on the north at an old wall, which formerly constituted the southerly boundary of the road. The court held that the line ran to the center of the road, although this was more than seven rods. The rule is stated in *Motley v. Sargent*, supra, as follows: "It is a general rule of construction that, where there is a boundary upon a fixed monument which has width, as a way, stream, or wall, even if the measurements run only to the side of it, the title to the land conveyed passes to the line which would be indicated by the middle of the monument."

The rule is then well established when the road is the terminus ad quem, but there is little authority when it is the terminus a quo, and there is no monument at the other end of the line. A majority of the court is of opinion that it is a common method of measurement in the country, where the boundary is a stream or way, to measure from the bank of the stream or the side of the way; and that there is a reasonable presumption that the measurements were made in this way, unless something appears affirmatively in the deed to show that they began at the center line of the stream or way. The ruling of the court, in the construction of the deed, was therefore prima facie correct, as there was no monument to determine the other end of the line. But this presumption can be controlled by evidence that the parties at the time of the conveyance established monuments of the boundaries. Without determining whether, in this case, there can be said to be a latent ambiguity in the deed, (see *Hoar v. Goulding*, 116 Mass. 132,) or merely an indefiniteness in the description, we are of opinion that the acts of the parties, contemporaneous with the delivery of the deed, in fixing the monuments, and the subsequent fencing of the lot and the occupation in accordance therewith, are admissible in evidence upon the construction to be given to the deed. *Blaney*

v. Rice, 20 Pick. 62, 32 Am. Dec. 204; Stewart v. Patrick, 68 N. Y. 450; Hamm v. San Francisco, 17 Fed. 119.

New trial.

KAISER v. DALTO.

(Supreme Court of California, 1903. 140 Cal. 167, 73 Pac. 828.)

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; George H. Bahrs, Judge.

Action by Joseph Kaiser against Luigi Dalto and wife. From an order denying a motion for a new trial, defendants appeal. Affirmed.

COOPER, C.⁵ This action was brought to enjoin defendants from entering upon a strip of land alleged to belong to plaintiff along the north side of his lot, 46 feet and 6 inches long and 5¾ inches wide, and from building a wall and committing other trespasses thereon. The case was tried before the court, findings filed, and judgment entered for plaintiff granting the injunction as prayed. Defendants have not appealed from the judgment. They made a motion for a new trial, which was denied, and this appeal is from the order denying the motion. * * *

Defendants claim that the evidence is insufficient to support the finding that the title to the strip of land is in plaintiff. We have carefully examined the evidence, and find it sufficient to support the finding. One Sanborn, a deputy in the city and county surveyor's office testified from the official record made by the city and county surveyor in March, 1868. This record was received in evidence without objection. The witness said that it showed the monumental lines from which Green street was established, and that the strip of land was on plaintiff's side of the line by this survey. One Munch, a surveyor, testified that he made a survey of the plaintiff's lot November 3, 1895; that in making the survey he took the first survey on record in the city and county surveyor's office; that "in making an examination of those lines I found the original marks made in 1873, according to the diagram in the city and county surveyor's office, on the premises out in the fence in the rear, and in the front. I found them covered up by a board, and I knocked the board off, and I verified my own conclusions from the marks." The witness further testified that the land in contest was on plaintiff's side of the line according to his survey.

One Gibbs, a civil engineer and surveyor, testified in substance to the same effect as did Munch. He said "the north line of Kaiser's lot is a continuation of the fifty-vara line, and is the dividing line of the fifty-vara lot." One Kohler testified that he owns considerable property on Reed place and in the immediate vicinity; that he owns the 50-vara lot on the east of plaintiff's lot; that there is an old build-

⁵ Part of the opinion is omitted.

ing there, which was erected in 1866 or 1867, and he saw the old survey marks on the building; that the old house has been on the line ever since it was built, and has always been considered correct; that the line is the same as made in 1868, and divides the 50-vara lot in half; that the strip of land is on plaintiff's side of the line. One Irons, who formerly owned the lot now owned by defendants, testified that he owned it for about 10 years, and sold it in 1888; that while he was the owner of the lot now owned by defendants and plaintiff was the owner of the lot on the south, they put up a bulkhead with a fence between their property on the westerly end from the front of Irons' house to Reed place; that this bulkhead was built direct in line with the fence in the rear; that this line was agreed upon between plaintiff and witness "as being the true dividing line between the two lots." Plaintiff testified to this agreement with Irons, and that the strip of land was within his boundaries as per the agreed line. There is other testimony to the same effect, but the above is sufficient.

The testimony of surveyors on the part of defendants was sharply in conflict with the above as to the division line by a survey by courses and distances. The defendants' surveyors took the monumental line of Green street as they located it. They found an original line monument at a point on Union street near Hyde, thence from the line of Union street across the block to Green street, a distance of 275 feet, thence 68 feet across Green street, and thence 68 feet and 9 inches to the line of defendant's lot. These surveys may have been correct by courses and distances, but in the course of 30 or 40 years a change in the position of the monuments or the surface of the earth might easily cause a variation of 4 or 5 inches. The lines as originally located must govern in such cases. The survey as made in the field, and the lines as actually run on the surface of the earth at the time the blocks were surveyed and the plats filed, must control. The parties who own the property have a right to rely upon such lines and monuments. They must, when established, control courses and distances. A line, as shown by monuments and as platted by the city authorities, and as acquiesced in for many years, cannot be overturned by measurements alone.

We advise that the order be affirmed.

We concur: HAYNES, C.; SMITH, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

IV. The Habendum, Tenendum, and Conclusion ⁶

HUGHES v. HAMMOND.

(Court of Appeals of Kentucky, 1910. 136 Ky. 694, 125 S. W. 144, 26 L. R. A. [N. S.] 808.)

Appeal from circuit court, Henry county.

"To be officially reported."

Suit by Mary S. Hammond against Lawrence Hughes for specific performance of a contract for the sale of land. Judgment for complainant, and defendant appeals. Affirmed.

NUNN, C. J. Appellant purchased from appellee 42 and a fraction acres of land at the price of \$100 an acre, and agreed to make the first payment upon a day named, upon the tender of a deed by appellee conveying to him a good title of general warranty. Appellee tendered him a deed upon the day agreed upon and demanded the first payment, which appellant declined to make upon the ground that the deed did not convey to him a good title, and appellee then instituted this action to compel him to perform his part of the contract which was in writing. Appellant answered the petition, and set forth the conveyance from appellee's father and mother to her for the land, which he claimed conveyed to her the fee, subject to be defeated by her dying without children. He also alleged that appellee's husband died after the conveyance from her mother and father to her, and that she now has two children who reside with her. A demurrer was sustained to this answer, and it was adjudged by the lower court that appellant accept the deed and make the payments as per the contract.

The conveyance executed by appellee's father and mother to her is as follows: "This indenture, made this 14th day of April, 1891, between I. M. Johnston and Annie Johnston, his wife, of the first part, Mary S. Hammond, his daughter, of the second part, both of the county of Henry and state of Kentucky, witnesseth that for the consideration of one dollar in hand paid the receipt of which is hereby acknowledged, and for the further consideration of love and affection, and for the still further consideration of \$2,000, to be taken from the interest that the party of the second part has in the estate of the party of the first part at his death, the party of the first part hereby conveys to the party of the second part, for own use, free from all marital rights of her present or any future husband she may have, a certain tract of land lying in Henry county, Ky., described as follows: [Here follows description.] To have and to hold said land to the party of the second part, her heirs and assigns, forever, with covenant of gen-

⁶ For discussion of principles, see Burdick, Real Prop. § 285.

eral warranty. If the party of the second part dies without bodily heirs, said land is to go back to the heirs of the first party."

The question to be determined is: What kind of a title did appellee receive under this conveyance? Appellee contends, and the lower court so adjudged, that it gave her a fee-simple title, but appellant insists that it does not. It is and should be the object of the court, in all cases where a deed or will is to be construed, to arrive at the intention of the parties to the conveyance and the testator. It will be observed that the only person named as the second party in the caption, granting, and habendum clauses in the deed, is appellee, except the habendum clause closes as follows: "If the party of the second part dies without bodily heirs, said land is to go back to the heirs of the first party." And it was these words that produced the doubt in appellant's mind as to the ability of appellee to convey him a good title. It has been established as a general rule that the granting clause in a deed controls, and if there is anything in the habendum clause that conflicts with it that part of the habendum clause must give way. As stated, appellee is the only person named as grantee in the caption of the deed; and the granting clause conveyed it to her without any restrictions, and by the habendum clause the land is conveyed to "her and her heirs and assigns, forever, with covenant of general warranty." This, undoubtedly, gave her the fee-simple title to the land, and the last words of the habendum clause, above quoted, are simply an attempt to limit her estate.

In the case of *Ray v. Spears' Ex'r, etc.*, 64 S. W. 413, 23 Ky. Law Rep. 814, this court, in construing a conveyance very similar to the one at bar, said: "It is well settled that the granting clause in a deed must prevail over the habendum, unless a contrary intention is shown by the deed. In this case both the granting and habendum clauses of the deed convey the fee forever, in as strong language as could be used, and after certain other property is conveyed, the addition to or condition is added, which, it is claimed, is a limitation, or which converts the title into a defeasible fee. It seems to us that the attempt to so limit the absolute grant is null and void, because utterly inconsistent with both the granting and habendum clauses of the conveyance."

Under the deed from appellee's father and mother, she was clearly given the right and power to convey this land, for it was recited in the conveyance that she was "to have and to hold said land to the party of the second part, her heirs and assigns, forever," which delegated to her the power to convey. Therefore, if we are mistaken with reference to the last clause of the habendum being rendered nugatory by the granting clause, her conveyance to appellant would pass the title by reason of this expressed power authorizing her to convey embodied in the conveyance. This court also said, in the case before cited, that "even if this conclusion is not tenable, and if any effect must be given at all to the conditions in question, it is clear that the grantor intended to invest the grantee with the power to sell and con-

vey the land, and, if he did so, its proceeds in the contingency provided for should vest in the grantor or his heirs, and, this being true, the grantee thereby became invested with fee, and with full power to convey a fee-simple title."

If the clause referred to is not invalid by reason of its conflict with the granting clause, still appellee, in our opinion, under the conveyance, has the right and power to convey a good and perfect title, and the heirs of appellee's father and mother must look to the proceeds derived from the sale of the land by appellee, and see that it reverts to them, instead of the 42 and a fraction acres of land, in case appellee dies without leaving children. This construction is clearly authorized by the terms of the conveyance. See, also, the case of *Clay, etc., v. Chenault, etc.*, 108 Ky. 77, 55 S. W. 729, 21 Ky. Law Rep. 1485, and the many authorities therein cited.

For these reasons, the judgment of the lower court is affirmed.⁷

BLAIR v. MUSE.

(Supreme Court of Appeals of Virginia, 1887. 83 Va. 238, 2 S. E. 31.)

Appeal from circuit court, Pittsylvania county.

RICHARDSON, J. This was a suit in equity in the circuit court of Pittsylvania county. The case lies within a narrow compass, and may be briefly disposed of. The object of the bill was to enforce the lien of a judgment, and execution thereon, in favor of the complainant for \$537.23, with interest and costs, obtained in the said court against one A. L. H. Muse on the fifth of September, 1876. The bill sets forth that on the fourth of October, 1847, the said Muse conveyed to his wife, Mary Ann Muse, and their children, Dorothy S., Frances Ann, and Rufus Muse certain personalty, and also a tract of land situate in the said county, containing 246 acres; that afterwards, some time in the year 1874, the said Frances Ann died intestate, unmarried, and without issue; and that her father, the said A. L. H. Muse, became her sole heir and distributee; that afterwards, and after the rendition of the said judgment, and its entry on the judgment lien docket of the said county, to-wit, on the tenth day of January, 1881, the said A. L. H. Muse and Mary A., his wife, conveyed the estate, real and personal, so inherited from the said Frances Ann Muse, deceased, to their said daughter, Dorothy S., then the wife of C. L. Carter, claiming the right to make such conveyance by virtue of the deed from the said A. L. H. Muse to his wife and children as aforesaid. The bill also charges that the deed to Mrs. Carter was made without authority of law, and is on its face fraudulent and void.

⁷ See, also, in accord, as to the controlling effect of the granting clause over the habendum, *Major v. Buckley*, 51 Mo. 227 (1873). The habendum, moreover, cannot be made to include lands not in the description. *Manning v. Smith*, 6 Conn. 289 (1826).

The principal question in the case turns upon the true construction of the deed of the fourth of October, 1847. In other words, the question is whether Frances Ann Muse took an interest in the property conveyed by that deed, which at her death passed to her father, the said A. L. H. Muse, under our statute of descents and distributions. The deed conveys, with general warranty, all the right, title, and interest of the grantor in and to the property, real and personal, described in the deed, unto the said Mary Ann Muse, Frances Ann Muse, Dorothy S. Muse, and Rufus Muse, their executors, administrators, and assigns, forever; and then follow what in the deed are called "the following exceptions and reservations," to-wit: "I reserve to my wife, the said Mary Ann, the power, right, and privilege to sell and convey, at any time, at her own pleasure, any part or the whole of the aforesaid land and premises," etc., "and her conveyance in such case shall be lawful and good, to the purchaser of the same," etc.

This latter clause in the deed is manifestly void and inoperative for several reasons. In the first place, it is irreconcilably repugnant to the preceding clause, the effect of which is to convey the property described in the deed to the four grantees absolutely and in fee-simple, and one of the essential incidents of a fee-simple estate is the unlimited power of alienation. Hence the grantor having conveyed the property absolutely to the four, the subsequent clause giving to the wife the power to dispose of the whole estate conveyed, at her pleasure, is invalid; for the rule is that, where two clauses in a deed are repugnant, the first shall prevail.

The case of *Humphrey v. Foster*, 13 Grat. 653, is not in conflict with this view. That case simply decided that under the statute then in force, and which applies to the deed in question, the whole deed should be looked to in order to ascertain the intention of the grantor, and consequently what estate was intended to be granted. But that is not the question before us. Here there are two utterly irreconcilable clauses in the deed, each expressed in clear and unmistakable language, which unquestionably brings the case within the rule above stated.

Nor is the clause in question valid as an exception; for an exception relates only to a thing that is severable from the thing granted, and not to an inseparable incident. Therefore, where a deed, as in this case, conveys property in fee-simple, and restrains the power of alienation, the latter provision is void, because, as we have seen, the power of alienation is ordinarily an inseparable incident of a fee-simple estate. 2 Minor, Inst. (1st Ed.) 76. And it is equally clear that the clause in question is not good as a reservation. A reservation applies to a thing not in esse at the time of the grant, but newly created, and which is reserved for the benefit of the grantor; as, for example, the reservation of a right of way over the estate conveyed, which, though it may have been previously enjoyed by the grantor as the owner of the estate, becomes a new right. It is needless, therefore,

to say that the so-called reservation of the exclusive power of alienation on the part of the wife of the grantor in the deed under consideration is void.

We are therefore of opinion that the said Frances Ann Muse took an undivided one-fourth interest absolutely and in fee-simple in the property conveyed by the deed of October 4, 1847, which passed at her death to the said A. L. H. Muse as her sole heir and distributee and that the decree of the circuit court dismissing the bill is erroneous. It only remains to say that, inasmuch as the single object of the bill is to subject the said undivided interest to the lien of the appellant's judgment and execution, it was not necessary to make the said Rufus Muse a party to the suit, and the demurrer to the bill ought therefore to have been overruled.

The decree of the said circuit court must be reversed and annulled, and a decree entered here in conformity with the views hereinbefore expressed.⁸

⁸ The following note is appending to this case in the *Southeastern Reporter*: "Where two clauses of a deed are inconsistent, the first clause will prevail. *Green Bay & Mississippi Canal Co. v. Hewitt*, 55 Wis. 96, 12 N. W. 382, 42 Am. Rep. 701 (1882), where M., being absolute owner of certain land, quit-claimed all his claim, right, title, and interest, of any name and nature, legal or equitable, in and to said land. A subsequent clause declared that 'the interest and title intended to be conveyed by this deed is only that acquired by said M. by virtue of' a certain described deed previously executed to him and which it was assumed conveyed to him only an undivided half of the land. It was held that the two clauses were inconsistent; that the first clause must prevail; and that M.'s whole interest passed by the deed. But a deed from the state land agent, under the Maine act of 1832, (chapter 30,) and containing a stipulation that, when the purchase money is paid, 'then this is to be a good and sufficient deed to convey said lots, otherwise to be null and void, and said lots to be and remain the property of said state,' does not convey the legal title to the grantee, but such title remains in the state till payment, *Stratton v. Cole*, 78 Me. 553, 7 Atl. 472 (1887); and words which are added in the latter part of a deed, for the sake of greater certainty, may be resorted to to explain preceding parts which are not entirely clear. *Wallace v. Crow* (Tex.) 1 S. W. 372 (1886). In descriptions of lands in deeds, that which is false or repugnant will be rejected to effectuate the intention of the grantor. *Holston v. Needles*, 115 Ill. 461, 5 N. E. 530 (1886), where, in the description in a deed, the words 'and thence,' used in locating a point on a line, being meaningless in the connection in which they stood, and by transposition becoming repugnant to the plain intent of the grantor, were rejected. Where the deed conveys, in general terms, the whole of a tract of land, with the exception of certain land described in another deed between the parties, such exception is not repugnant to the terms of the general grant, and is valid. *Koenigheim v. Miles*, 67 Tex. 113, 2 S. W. 81 (1886). And where a deed contained the reservation 'excepting and reserving all and all manner of metals and minerals, substances, coals, ores, fossils, and also all manner of compositions, combinations, and compounds, of any or all of the foregoing substances, and also all valuable earths, clays, stones, paints, and substances, and substances for the manufacture of paints, upon or under the said tract of land,' the court refused to interpret the reservation literally, which would make it a reservation of all that the deed conveyed and therefore void, as being repugnant, but construed it, according to the intent of the parties, which was that the ordinary glebe, timber, and waters, were not intended by the reservation, and therefore passed unaffected by

V. Delivery and Acceptance of Deeds *

1. IN GENERAL

MILLER et al. v. MEERS et al.

(Supreme Court of Illinois, 1895. 155 Ill. 284, 40 N. E. 577.)

Error to circuit court, Will county; Dorrance Dibell, Judge.

Plaintiffs in error, the seven children of William P. Bissell, filed their bill in equity in the circuit court of Will county against defendants in error, as executors and trustees under the last will of Martin C. Bissell, deceased, and against William Grinton and others, to compel the delivery to complainants of a deed executed to them by said Martin, in his lifetime, for certain real estate situated in Joliet, called the "Bissell Hotel Property," and to confirm and establish the title to said property in said plaintiffs. William P. Bissell, also, was made defendant to the bill. The executors filed a cross bill to compel the cancellation and delivery to them of said deed, and also of a life lease executed at the same time by said Martin to said William P. Bissell and wife. Issues were made on the bill and cross bill, and on a hearing the circuit court decreed that the bill be dismissed, and that the relief prayed by the cross bill be granted, and that the complainants pay the costs. This writ of error is brought by the complainants to reverse that decree.

The principal facts set up in the pleadings and established by the proofs are, in substance, as follows:

Martin C. Bissell, the owner of the property in question, resided in Joliet, and was a man of considerable wealth. His wife was living, but they had no children. He had permitted his brother William P. Bissell, the father of plaintiffs in error, who was possessed of small means, to occupy and run the hotel property for a number of years upon terms disclosed only by the testimony of said William, held by the court to be incompetent. The evidence does not, however, disclose that William had ever paid, or agreed to pay, any rent. In 1875, while William, with his wife and three minor children, were thus occupying the property, his adult children having established themselves in other parts of the country, Martin and his wife executed and acknowledged a warranty deed of the hotel property to plaintiffs in error, naming them, and as the children of said William,

It. Foster v. Runk, 109 Pa. 291, 2 Atl. 25 (1885). When a reservation is made in a deed, it is not necessary, in order to give it effect, that the grantor should, when he executes the deed, assert verbally his right to the property excepted from the conveyance. Hornbuckle v. Stafford, 111 U. S. 389, 4 Sup. Ct. 515, 28 L. Ed. 468 (1884)."

* For discussion of principles, see Burdick, Real Prop. § 289.

for the expressed consideration of one dollar and natural love and affection, and at the same time Martin executed and delivered to William and his wife a life lease to the same property. The deed recited that it was subject to the lease. The deed was drawn by the defendant William Grinton at Martin's request. Grinton also attested its execution, as a witness, and, as a notary public, took the grantors' acknowledgment. The certificate was in the usual form, certifying that the grantors acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein expressed. The lease was executed by Martin, as lessor, and William and his wife, as lessees; was delivered to William and his wife; purported to be for the term of their "natural lives," and upon the consideration that the lessees should pay all taxes, keep the premises in as good condition as when received, and keep the buildings insured,—three-fourths of the insurance for the benefit of the lessees, and one-fourth for their children, the plaintiffs in error. The lease also contained the following: "And it is further expressly agreed by and between the parties hereto that in case said premises should at any time be sold for taxes or assessments, and said party of the second part should fail to redeem said premises from such sale at least three months before the time of redemption from said sale expires, or if said parties of the second part shall both at any time cease to personally occupy said premises (loss or damage by fire or inevitable accident excepted), then and in either of said last-named events the said children of said William P. Bissell above named shall have the right, at their election, to declare said term ended, anything herein to the contrary notwithstanding, and the said demised premises, or any part thereof, to enter, and the said party of the second part, or any other person or persons occupying in or upon the same, to expel, remove, or put out, using such force as may be necessary in so doing." The deed and lease were dated January 11, 1875, but the acknowledgment was taken March 31, 1875.

Some time in 1877, because of some domestic trouble, William's wife left him, and went to a distant city to live with her sister, taking some of their younger children with her, and about six months thereafter William left the premises, also, and removed to Chicago; he and his wife having permanently separated, and neither of them, nor their children, having since then occupied the property. When Martin C. Bissell and wife executed the deed to plaintiffs in error, he left it with Grinton, the notary, and told him to take it and take care of it, giving no other directions respecting it. Grinton put it in an envelope and placed it in the safe in the office where he and Martin were engaged in business. He was then transacting business for Martin C. Bissell and himself under a contract by which he received a certain share of the profits. The private papers of each, as well as their

partnership papers, were kept in the safe. Grinton retained possession of the deed until he produced it in court after the death of Martin C. Bissell,—a period of about 15 years. He testified that it had never been out of his hands since it was placed there by Bissell, the grantor; and it does not appear that any one ever asked him for the deed until it was demanded by plaintiffs in error, shortly before the filing of this bill. After William P. Bissell left the property, in 1877, Martin C. Bissell took charge of it, collected the rents, and paid the taxes on it, and kept it in repair, the collections exceeding the disbursements by only a small amount.

Plaintiffs in error claim this was done by agreement between him and his brother William, while defendants insist it was done as the owner, in the exercise of his ownership of the property. Two witnesses (Stevens and Dirkman) testified that during this period Martin told them at different times that the property belonged to his brother's children. One of these witnesses,—an old neighbor of Martin's and who had formerly owned the property,—seeing that it "was running down," inquired of him about the property, and proposed to purchase it, but Martin told him he could not sell it; that it was not his; that he had deeded it to his brother's children, and had given his brother a life lease on it; that his brother had full control of it before he went to Chicago, but had allowed it to run to waste; and that he had paid the taxes for the benefit of his brother. One of these conversations, the witness testified, occurred seven or eight years before the trial, which took place in 1890, and the other five or six months before Martin's death. In the last conversation this witness, Stevens, asked Martin why William did not take care of the property; and the reply was that William and his wife had parted, and he did not seem to take much charge of it. The other witness testified that some four years before the trial he was employed by Martin in white-washing in the hotel. He was an elder or steward in the African Methodist Episcopal Church, and was interested in procuring a site for a church, and suggested to Mr. Bissell the idea of letting him have the property so that he "could turn it over for a church," but that Mr. Bissell replied that he could not let him have it; that it was his brother's children's property, and he would attend to it. Two witnesses (Grinton and Vose) testified for defendants that, after William P. Bissell left the property, Martin C. Bissell turned it over, first to Grinton, and then to Vose, who took charge of it, kept the account of collections and disbursements, and carried it on the books in Martin's name, and in the same manner as other property of Martin's. Vose testified that Martin tried to sell it, and in 1885 talked of trading it for land in Virginia. Vose claimed to have acquired an interest in the property, and had a suit pending against the executors to enforce it. Martin C. Bissell, by his will, after making various small bequests to plaintiffs in error and others, gave the bulk of his

estate to defendants in error, in trust for certain religious purposes. The testator's property was not specifically described in the will.

CARTER, J.¹⁰ (after stating the facts). The controverted question in this case is, did the title to the hotel property, subject to the lease to William P. Bissell, vest in plaintiffs in error by virtue of the deed of Martin C. Bissell and wife, or did the deed fail to take effect, because of nondelivery? * * *

But the question still arises whether or not, after considering all proper evidence and rejecting all held to be improper, the decree of the trial court can be sustained. "No particular form or ceremony is necessary to constitute a delivery" of a deed. "It may be by acts without words, or by words without acts, or by both. Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed shall presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a sufficient delivery. The very essence of the delivery is the intention of the party." *Bryan v. Wash*, 2 Gilman, 557; *Cline v. Jones*, 111 Ill. 563, and cases there cited. It is well settled that the law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements, especially in favor of infants, than in ordinary cases of bargain and sale. The acceptance by the infant will be presumed. And it is even held that an instrument may be good as a voluntary settlement, though it be retained by the grantor in his possession until his death, providing the attending circumstances do not denote an intention contrary to that appearing upon the face of the deed. *Bryan v. Wash* and *Cline v. Jones*, *supra*; *Reed v. Douthit*, 62 Ill. 348; *Walker v. Walker*, 42 Ill. 311, 89 Am. Dec. 445; *Otis v. Beckwith*, 49 Ill. 121; *Masterson v. Cheek*, 23 Ill. 72; *Souverbey v. Arden*, 1 Johns. Ch. (N. Y.) 242; *Bunn v. Winthrop*, Id. 329; *Scrugham v. Wood*, 15 Wend. (N. Y.) 545, 30 Am. Dec. 75; *Perry, Trusts*, § 103; *Urann v. Coates*, 109 Mass. 581; *Tompkins v. Wheeler*, 16 Pet. 114, 10 L. Ed. 903. And it was said in *Walker v. Christen*, 121 Ill. 97, 11 N. E. 893, 2 Am. St. Rep. 68, that "the crucial test, in all cases, is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery were done."

The deed in question must have taken effect at once upon its acknowledgment and delivery to Grinton, or not at all; and the real question is, with what intention was the deed placed in the hands of Grinton? *Blackman v. Preston*, 123 Ill. 385, 15 N. E. 42; *Hayes v. Boylan*, 141 Ill. 408, 30 N. E. 1041, 33 Am. St. Rep. 326; *Bovee v. Hinde*, 135 Ill. 137, 25 N. E. 694; and cases *supra*. Nothing was said by the grantor at the time to indicate an intention that the deed should not take effect. His instructions were to take the deed, and take care of it,—whether for himself or the grantees, he did not say

¹⁰ Part of the opinion is omitted.

The grantees were his nephews and nieces, seven in number; the adults living in different places, and the minors, with their father, his brother, on the premises conveyed. Under the circumstances, it may have been a question of some difficulty, in his mind, to determine to whom the deed should be delivered. Instead of delivering it to either of the grantees, he could lawfully deliver it to a third person for their benefit. He did deliver it to a third person, and whether for their benefit, or only as custodian for himself, is a question of fact, to be determined from the evidence.

Defendants insist that Grinton was the grantor's clerk, and that his possession was the possession of the grantor. It is not clear from the evidence what the business relations were between Grinton and Martin C. Bissell. Grinton testified that he was not employed by the day, week, month, or year; that he always had a partnership contract with Mr. Bissell in the profits, and that that was the case when these papers were executed; that the "partnership papers," as witness called them, as well as his individual papers and those of Martin C. Bissell, were all kept in the safe. Whether he was responsible for the losses and expenses of the business is not disclosed by the evidence. From the evidence given, he may have been a partner in business with Bissell, or merely an employé receiving a share of the profits as a measure of his pay for his services. In *Lockwood v. Doane*, 107 Ill. 235, this court held that: "Where parties agree to share in the profits of business, the law will infer a partnership between them in the business to which the agreement refers, but this presumption may be disproved. It is *prima facie* evidence, and will control until rebutted." *Niehoff v. Dudley*, 40 Ill. 406. Under the evidence and these authorities, it would seem that the relation between Grinton and Martin C. Bissell, at the time of the transaction in question, must be treated as that of a partnership. If so, the transaction not pertaining to their partnership affairs, possession of the deed by Grinton was not, by virtue of their relation, the possession of the grantor, but was the possession of a third person. Grinton took this deed, and placed it in an envelope, and put it in the safe, and kept it in his possession for 15 years thereafter, until the trial in the circuit court. Had Martin intended to retain control of it, he could as well have placed it with his own papers in the safe. This he did not do, nor did he ever assume or assert any control over the deed afterwards.

Grinton was a notary public, and as such took the acknowledgment. By this acknowledgment the grantors acknowledged that they signed, sealed, and delivered the instrument as their free and voluntary act, for the uses and purposes expressed in it. Whether, on an issue as to the delivery of a deed, otherwise left in doubt by the proofs, such an acknowledgment would be sufficient evidence of a delivery, it is not necessary in this case to decide; for, as we conceive, the intention of the grantor is otherwise disclosed by the evidence

with sufficient clearness, and this, too, whether Grinton was a partner or a mere employé of Martin C. Bissell. We find nothing in the attending circumstances denoting an intention on the part of the grantor that the deed should not take effect; but, on the contrary, there is sufficient evidence that he intended the deed to become presently effective. He at the same time executed and delivered to his brother, the father of plaintiffs in error, and to his brother's wife, who were already in possession of the property, a life lease therefor. The deed was, on its face, made subject to the lease. By the lease the lessees were required to insure the property for the benefit, in part, for themselves, and in part for the grantees. The lease recognized the grantees as the owners of the property, and, for breach of any of the covenants in the lease, they were authorized to declare the term ended, and to enter and expel the lessees. The lease and deed were executed together, and were parts of the same transaction, whereby Martin C. Bissell disposed of all his interest in, the possession of, and title to, the property. He reserved nothing in either the lease or deed.

The delivery of the lease to, and the possession of the property by, William, are not disputed. The right to declare a forfeiture and to re-enter was not reserved to the lessor, but to plaintiffs in error, the grantees in the deed. It would seem from this provision that, at the time of the transaction, Martin C. Bissell intended that the title should vest in appellants; and that he understood it did so vest. Then, again, it was clearly proved that after William had left the property, and Martin had taken possession and made repairs, leased it, paid the taxes, and, to all outward appearances, acted as the owner, he told two witnesses that the property belonged to his brother's children, and that he could not, for that reason, sell or dispose of it, but would attend to it,—evidently meaning that he was taking care of it for his brother and his brother's children. It may be that after the lapse of years he concluded that he was entitled to and would retain the property as his own. In other words, he may have changed his mind in reference to making a gift of the property to these beneficiaries, honestly concluding that under the circumstances he had a right to do so, but if he did so conclude he was simply mistaken as to the legal effect of what had been done. The facts are somewhat similar to those in *Douglas v. West*, 140 Ill. 461, 31 N. E. 403. See, also, *Winterbottom v. Pattison*, 152 Ill. 334, 38 N. E. 1050. We are satisfied from the evidence that Martin C. Bissell intended that the deed should take effect when he executed and acknowledged it and delivered it to Grinton, and it must be so held.

The decree of the circuit court is reversed, and the cause remanded, with directions to dismiss the cross bill, and to enter a decree in accordance with the prayer of the bill of plaintiffs in error. Reversed and remanded.

DECKER v. STANSBERRY.

(Supreme Court of Illinois, 1911. 249 Ill. 487, 94 N. E. 940, Ann. Cas. 1912A, 227.)

Appeal from Circuit Court, Jasper County; Thomas M. Jett, Judge.

Bill by Michael Decker against Dale Stansberry and others. Decree for complainant, and defendants appeal. Reversed and remanded.

HAND, J. This was a bill in chancery, filed by Michael Decker against Dale Stansberry, Orville Stansberry, Lewis Decker, and John H. Shup, to remove, as a cloud upon the title of Michael Decker to the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the undivided seven-eighths of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15, township 8 N., range 14 W. of the second principal meridian, Jasper county, Ill., a deed from Michael Decker and wife to Clarence M. Decker, bearing date March 17, 1885, to the undivided seven-eighths of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 15; also an administrator's deed executed by John H. Shup, administrator de bonis non of the estate of Clarence M. Decker, deceased, to the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the undivided seven-eighths of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 15, bearing date March 17, 1909, both of which deeds had been recorded in the office of the recorder of deeds of Jasper county. The defendant Dale Stansberry filed an answer, in which she denied all the material allegations of the said bill. Orville Stansberry filed a plea, denying that all parties in interest had been made parties defendant to said bill. John H. Shup filed a disclaimer, and Lewis Decker, a minor, died pending the suit in the circuit court. A replication was filed to the answer. The case was referred to a commissioner to take the proofs, and a decree was entered finding that Michael Decker was the owner of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 15, and that Dale Stansberry was the owner of the undivided seven-eighths of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 15, dismissing the bill as to the undivided seven-eighths of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 15, and setting aside said administrator's deed as a cloud upon the title of Michael Decker to the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 15. Dale Stansberry and Orville Stansberry have prosecuted an appeal to this court, and have assigned error as to the action of the court in holding that Michael Decker was the owner of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15, in decreeing that Dale Stansberry was the owner of the undivided seven-eighths of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15, and in dismissing the bill as to said premises.

The facts, in brief, are as follows: In the year 1885 Michael Decker owned a farm of 200 acres, situated in Jasper county, upon which he resided with his wife and children as their home; that some time prior to that date he signed a guardian's bond, upon which default was made; that his principal and cosurety were insolvent; that in

order to escape liability upon the bond he advised with a justice of the peace residing in the immediate neighborhood, and thereupon determined to convey all of his real estate, except his homestead, to his minor sons, whereupon he executed a deed to his son Thomas for 40 acres of his farm, and a deed to his son Clarence M. for 75 acres of his farm, his wife joining therein; that the deeds, when executed, were delivered to the justice of the peace who prepared them, and he was instructed by Michael Decker to have them recorded; that after the deeds were recorded they were returned to Mr. Decker, and they remained in his possession until the date of the trial; that Clarence M. Decker, at the time the deeds were executed and recorded, was six years of age; that the premises in the deed to Clarence M. Decker were described as "the northeast quarter and the undivided seven-eighths of the northwest quarter of the northwest quarter of section fifteen (15), town eight (8) north, range fourteen (14) west, containing seventy-five (75) acres, more or less, situated in the county of Jasper, in the state of Illinois," and the deed recited a consideration of \$750; that Clarence M. Decker continued to reside with his parents upon said farm until he was about 20 years of age, when he enlisted in the army; that after his return from the Philippines, and discharge, he made his home with his parents until he was married to Dale Anderson, now the appellant Dale Stansberry; that after his marriage he and his wife lived at his father's home for a time, and while a small house was being erected on the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 15; that after the completion of said house Clarence M. Decker and wife moved onto the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15, where Lewis Decker was born, and where Clarence M. Decker and family lived until his death, which occurred in 1905, during which time he farmed the 75-acre tract, and paid rent to his father for a part of said premises; that after the death of Clarence M. Decker his widow and child resided for a time with her people, and afterwards returned to and resided in the house which had been erected upon said farm as a home for Clarence M. Decker and family; that, subsequent to the death of Clarence M. Decker, Michael Decker seems to have controlled the land, other than the dwelling house, and paid to the widow \$50 per year, which she testified was paid as rent, but which Michael Decker testified was given her by him for the support of the child; that Michael Decker always paid the taxes on said lands; that about four years after the death of Clarence M. Decker letters of administration were taken out on his estate, and the 75 acres in question were sold at administrator's sale by John H. Shup to pay debts, which included the widow's award, and Dale Decker (now Dale Stansberry) was the purchaser at the sale and received an administrator's deed therefor, which is the deed sought to be set aside in this proceeding; that shortly thereafter the widow married Orville Stansberry, and the Stansberrys were living in the house upon the premises at the time this bill was filed, and claimed to be in pos-

session of the entire 75 acres which are now in controversy, under said administrator's deed.

While it is contended that this bill will not lie to remove a cloud, by reason of the fact that the land was not vacant or the complainant was not in possession of the land at the time he filed his bill, those questions do not seem to have been raised in the trial court, so they will therefore be deemed to have been waived, and will not be considered by this court. *Stout v. Cook*, 41 Ill. 447.

The controlling question in this court, as we view this case, is: Was the deed from Michael Decker and wife delivered to Clarence M. Decker, so as to invest him with the title to said premises? The grantor and wife executed the deed and had it recorded, and the grantor thereafter retained the deed. Where a father executes a deed to his minor child, who is of tender years, and has it recorded, under the decisions of this court those acts constitute a good delivery of the deed to the child. In *Hayes v. Boylan*, 141 Ill. 400, on page 406, 30 N. E. 1041, on page 1042, 33 Am. St. Rep. 326, it was said: "Where a parent executes a deed to an infant child, which is beneficial to the child, and manifests, by his words and conduct, that he intends that the deed shall operate at once, a delivery will be presumed, and proof of actual delivery is unnecessary. This is because the infant is incapable of doing any act in regard to the deed which he might not avoid on reaching his majority, and it is the duty of the parent, as his natural guardian, to accept and preserve the deed for him. *Masterson v. Cheek*, 23 Ill. 72; *Bryan v. Wash*, 2 Gilman, 557; *Newton v. Bealer*, 41 Iowa, 334." And in *Winterbottom v. Pattison*, 152 Ill. 334, on page 340, 38 N. E. 1050, on page 1051, it was said: "The grantee's acceptance will sometimes be presumed from the fact that the deed is for his benefit. *Rivard v. Walker*, 39 Ill. 413; 5 Am. & Eng. Ency. of Law, 448. Where the grantee is an infant, the presumption of acceptance is a rule of law, and 'knowledge of the conveyance and of its acceptance is not necessary.'" In the case of *Baker v. Hall*, 214 Ill. 364, 73 N. E. 351, the authorities upon this question are collated and reviewed, and in *Creighton v. Roe*, 218 Ill. 619, 75 N. E. 1073, 109 Am. St. Rep. 310, it was held that, where a deed is recorded, the presumption of delivery is not overcome by the fact that the grantor, who stood in a fiduciary relation to the grantee, retained possession of the property and deed.

We are of the opinion that the deed from Michael Decker and wife to Clarence M. Decker was delivered. The deed having been delivered, and the title having vested in Clarence M. Decker, and it appearing the deed was made for the purpose of placing the premises in question beyond the reach of the creditors of Michael Decker, a court of equity will not assist him in reclaiming the land. In *Jolly v. Graham*, 222 Ill. 550, on page 554, 78 N. E. 919, on page 920 (113 Am. St. Rep. 435), it was said: "The law will not permit a party to deliberately put his property out of his control for a fraudulent pur-

pose, and then, through the intervention of a court of equity, regain the same after his fraudulent purpose has been accomplished." And in *Creighton v. Roe*, supra, 218 Ill. on page 624, 75 N. E. on page 1075, 109 Am. St. Rep. 310, it was said: "There is another good reason why the decree of the circuit court must be affirmed. The bill is a confession on the part of the plaintiff in error that he made the deed which he now seeks to avoid, for the purpose of placing his property in such condition that his wife could not secure her dower out of it. * * * That he could not put it out of his hands for the purpose of defeating dower, and, when the motive for so doing had ceased, invoke the aid of a court of equity to reinvest himself with the title, is too well known for controversy. *Muller v. Balke*, 154 Ill. 110 [39 N. E. 658]; *Tyler v. Tyler*, 126 Ill. 525 [21 N. E. 616, 9 Am. St. Rep. 642]." See, also, *Miller v. Marckle*, 21 Ill. 152; *Kirkpatrick v. Clark*, 132 Ill. 342, 24 N. E. 71, 8 L. R. A. 511, 22 Am. St. Rep. 531; *Brady v. Huber*, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161; *Jones v. Jones*, 213 Ill. 228, 72 N. E. 695.

It is finally contended that the deed from Michael Decker to Clarence M. Decker did not cover the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15. The description is as follows: "The northeast quarter and the undivided seven-eighths of the northwest quarter of the northwest quarter of section 15," etc., and containing 75 acres, more or less. The evidence shows the grantor owned the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15, but did not own the N. E. $\frac{1}{4}$ of that section, and the deed recites that he conveyed 75 acres, more or less, and the justice of the peace testified, and Michael Decker admitted, the deed was intended to cover the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, etc., of section 15. It is obvious, we think, that any one reading the description found in the deed would understand the grantor intended to convey, and did convey, the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15, and not the N. E. $\frac{1}{4}$ of section 15, when the description is read in connection with the number of acres to be conveyed. When a description in a deed may refer to two tracts of land, it will be presumed that the grantor intended to convey the tract which he had title to, and not the land which he did not own (*Dougherty v. Purdy*, 18 Ill. 206; *Cornwell v. Cornwell*, 91 Ill. 414); and it is held, when a deed contains two descriptions, it should be construed most strictly against the grantor and in favor of the grantee. *City of Alton v. Illinois Transportation Co.*, 12 Ill. 38, 52 Am. Dec. 479; *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61; *Boone v. Clark*, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276.

From a careful consideration of this record, we think it clear that the deed from Michael Decker to Clarence M. Decker was made to defraud creditors; that it was delivered to the grantee; that it conveyed the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the undivided seven-eighths of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15; and that Dale Stansberry acquired title to the entire 75 acres at the administrator's sale.

The decree of the circuit court, so far as it finds the title to the

N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15 to be in Michael Decker, and sets aside the administrator's deed to Dale Stansberry, will be reversed. In all other particulars the decree will be affirmed, and the case will be remanded to the circuit court, with directions to dismiss the bill. Reversed and remanded, with directions.

2. DELIVERY AS AN ESCROW

SHURTZ v. COLVIN.

(Supreme Court of Ohio, 1896. 55 Ohio St. 274, 45 N. E. 527.)

Error to circuit court, Muskingum county.

The original suit was commenced by Oliver C. Shurtz, as administrator of Lewis Schultz, deceased, against James Colvin, for the foreclosure of a mortgage given by the latter to the decedent to secure a loan of \$6,500. James E. Colvin, who had a subsequent mortgage on the same land, was made a party. James Colvin made no defense. James E. Colvin filed an answer and cross petition. He claimed priority over the mortgage of the plaintiff on two grounds: (1) That at the time the Shurtz mortgage was made he was the legal owner of an undivided one-third interest in the fourth, fifth, and sixth tracts included in the Shurtz mortgage; that he, with his co-tenant, Silas H. Colvin, had by a verbal agreement sold the land to James Colvin, but the purchase money had not been paid, and on April 8, 1887, they made a deed, and placed it in the hands of one Howard Colvin, to be delivered when the money had been paid or secured to be paid; that, contrary to instructions, Howard delivered it on August 3, 1887, the money not having been paid,—the Shurtz mortgage having been made prior thereto on July 23, 1887.¹¹

MINSHALL, J.¹² * * * James E. Colvin had, by a verbal agreement made in 1884, sold his interest in the premises to James Colvin, who went into possession under the agreement, and was in possession at the time the Shurtz loan was made. Some time before the making of the Shurtz mortgage, James E. Colvin, with his co-tenant Silas H. Colvin, executed a deed for the land to James Colvin, the purchaser, and placed it in the hands of a third person, Howard Colvin, to be delivered when the purchase money was paid or secured by mortgage. Afterwards, for the purpose of enabling James Colvin to obtain a loan of money on the land, Howard delivered the deed to him, that he might obtain a description of the premises, and exhibit it as evidence of his title. The facts found bear this construction,

¹¹ Part of the statement of facts is omitted.

¹² Part of the opinion is omitted.

and none other. It is true that, from the facts found, it was not to be regarded as delivered. But the law has always attached much importance to an overt act. It contravenes its spirit to allow that an act may be done with an intention contrary to the act itself. And while, as between parties, the intention may be shown, it seldom permits this to be done where to do so would work a fraud on innocent third persons. Here, while James Colvin was in possession of the land and of a deed to it by James E. Colvin, of whom he had purchased, the Shurtzes, on the faith of these appearances, loaned him \$6,500, and took a mortgage on the land to secure its payment, and, as the court expressly finds, without any knowledge that the deed had ever been held as an escrow by any one, and that it was taken in good faith, without any knowledge that James E. Colvin had or claimed any interest in or lien on the land. It would seem, on the plainest principles of justice, that under these circumstances James E. Colvin, as against the owner of the Shurtz mortgage, should not be heard to say that the deed had not in fact been delivered at the time the mortgage was made, and that his equity is superior to it. He trusted Howard with the deed, to be delivered when the conditions had been performed. Howard violated his trust. He delivered it to the grantee, that the latter might obtain a loan on the land by exhibiting it as evidence of his title. The loan was so obtained of persons who had no knowledge of the facts, and were entirely innocent of any fraud in the matter. Who, then, should suffer the loss? It may be regarded as one of the settled maxims of the law that where one of two innocent persons must suffer from the wrongful act of another, he must bear the loss who placed it in the power of the person as his agent to commit the wrong. Or, more tersely, he who trusts most ought to suffer most. And it would seem that the rights of the parties in this case should be governed by this principle, unless there is some rigid exception, established by the decession, which forbids its application where a deed is delivered in escrow.

Before considering this question, it may be well to note that no importance can be attached to the fact that the deed on the faith of which the loan was made had not yet been recorded. A deed on delivery passes title to the land, whether recorded or not. It takes effect on delivery. The object of recording a deed is to give notice to third persons, not to perfect it as a muniment of title. Where not recorded, it will be treated as a fraud against third persons dealing with the land without notice of its existence. Hence the first deed, if delivered, having been duly executed, passed the title to James Colvin. Recording it would have added nothing to its effect as a deed, and the failure to record it in no way influenced the conduct of any of the parties to the suit. There are some cases which seem to hold that, where a deed is delivered as an escrow to a third person, to be delivered on the performance of certain conditions, no title passes if

delivered without the conditions being performed, and that this is so as against an innocent purchaser from the vendee. *Everts v. Agnes*, 6 Wis. 453, is such a case. The argument there is that no title passes by deed without delivery; that where a deed is delivered by one who holds it as an escrow, contrary to the vendor's instructions, there is no delivery, and consequently an innocent purchaser acquires no title.

To the objection that, if this be true, there is no safety for purchasers, the court said that, if it be not true, there is none for vendors. This seems to be a misconception of the real situation of the parties. A vendor may protect himself. He may either retain the deed until the vendee pays the money, or select a faithful person to hold and deliver it according to his instructions. If he selects an unfaithful person, he should suffer the loss from a wrongful delivery, rather than an innocent purchaser without knowledge of the facts. In purchasing land, no one, in the absence of anything that might awaken suspicion, is required, by any rule of diligence, to inquire of a person with whom he deals whether his deed had been duly delivered. Where a deed is found in the grantee's hands, a delivery and acceptance is always presumed. 3 Washb. Real Prop. (5th Ed.) p. 312, pl. 31. The fact that, under any other rule, "no purchaser is safe," had a controlling influence with the court in *Bleight v. Schenck*, 10 Pa. 285, 292, 51 Am. Dec. 478. In this case the question was whether a deed had been delivered, the defendant being an innocent purchaser from the vendee of the plaintiff. In discussing the case the court used this language: "Here Curtis, who, it is alleged, delivered the deed contrary to his instructions, was the agent of the grantor. If a man employs an incompetent or unfaithful agent, he is the cause of the loss so far as an innocent purchaser is concerned, and he ought to bear it, except as against the party who may be equally negligent in omitting to inform himself of the extent of the authority, or may commit a wrong by acting knowingly contrary thereto." And the case was disposed of according to this principle.

The case on which most reliance is placed by the defendant in error is that of *Ogden v. Ogden*, 4 Ohio St. 182. The facts are somewhat complicated. It seems to have grown out of an agreement for an exchange of lots between two of the parties, each being the equitable owner of his lot. The deed for the lot of one of them, David Ogden, was to be delivered by the legal owner to the other on his performing certain conditions, and was delivered to a third person, to be delivered on the performance of these conditions. It was delivered without the conditions being performed, and the lot was then mortgaged by the grantee to the defendants Watson and Stroh, who claimed to be innocent purchasers for value. But it was charged in the bill that they took their mortgages with notice, and to cheat and defraud the complainant; and it does not distinctly appear whether

this was true or not. From the reasoning of the court it would seem that the deed had been obtained from the party holding it in some surreptitious manner. It is first conceded "that if David reposed confidence in Gilbert, and he violated that confidence, and delivered the deed, and loss is to fall on either David or the mortgagees, that David should sustain that loss, and not the innocent mortgagees." Instances are then given in which the rule would be otherwise,—an innocent purchaser from the bailee of a horse, or of stolen property, or from one who had either stolen or surreptitiously obtained his deed. There is no room for doubt in either of these cases. But the court then observes that, "if the owner of land makes a deed purporting to convey his land to any one, and such person by fraud or otherwise procures the owner to deliver the deed to him, a bona fide purchaser from such fraudulent grantee, without notice of the fraud, might acquire title to the land." This, we think, is equally clear; but, unless the deed in the case had been stolen or surreptitiously obtained, or the mortgagees were guilty of the fraud charged, then, on the reasoning of the court, the decree should have been in their favor.

If the case is to be understood as holding differently, then it is not in accord with the later decision in *Resor v. Railroad Co.*, 17 Ohio St. 139. Here the owner of a tract of land contracted to sell it to the company, but refused to deliver the deed until paid. An agreement was then made by which the deed was placed in the hands of the president, but it was not to be considered delivered until payment had been complied with, and the company went into possession. The president wrongfully placed the deed on record, and the company then mortgaged its entire property to secure an issue of bonds. The court held the bondholders to be innocent purchasers, and that the plaintiff was estopped from setting up his claim as against them. It might be claimed that the delivery by Resor was to the purchaser, the company, and that a deed cannot be delivered as an escrow to the vendee. The latter statement is true. But, as a matter of fact, it was delivered to the president of the company, and not to the company itself. There is no reason why the president could not have held it as an escrow, and, under the agreement, must be regarded as having so held it. *Railroad Co. v. Iliff*, 13 Ohio St. 235; *Watkins v. Nash*, L. R. 20 Eq. 262; *Insurance Co. v. Cole*, 4 Fla. 359. The plaintiff trusted the president to hold the deed, and it was his wrongful act that disappointed him. The supreme court of Indiana, in a well-considered case (*Quick v. Milligan*, 108 Ind. 419, 9 N. E. 392, 58 Am. Rep. 49), the facts of which are very similar to the case before us, held, where a deed is delivered to a third person, to be delivered the grantee, who is already in possession of the land, on payment of the purchase money, and is delivered without the condition being performed, that the vendor is estopped, as against an innocent purchaser, to set up his title. See, also, and to the same effect, the

following cases: *Bailey v. Crim*, 9 Biss. 95, Fed. Cas. No. 734; *Haven v. Kramer*, 41 Iowa, 382; *Bleight v. Schenck*, 10 Pa. 285, 51 Am. Dec. 478.

It is the general, if not universal, rule of the courts to protect the innocent purchaser of property for value against such vices in the title of their vendors as result from fraud practiced by them in acquiring the property, for in all such cases the party complaining is found to have been guilty of some negligence in his dealings, or to have trusted some agent, who has disappointed his confidence, and is more to blame for the consequences than the innocent purchaser, so that his equity is inferior to that of such purchaser. Hence it is that the innocent purchaser for value from a fraudulent grantee is always protected in his title as against the equity of the wronged grantor. In *Hoffman v. Strohecker*, 7 Watts (Pa.) 86, 32 Am. Dec. 740, where a sale had been made under execution upon a satisfied judgment, the satisfaction not appearing of record, an innocent purchaser of the person who purchased at the sale was protected in his title, although the purchaser at the sale had knowledge of the facts and acquired no title. A similar holding had been made by the same court in *Price v. Junkin*, 4 Watts (Pa.) 85, 28 Am. Dec. 685, and in *Fetterman v. Murphy*, 4 Watts (Pa.) 424, 28 Am. Dec. 729. In the case of *Price v. Junkin*, it is said: "An innocent purchaser of the legal title, without notice of trust or fraud, is peculiarly protected in equity; and chancery never lends its aid to enforce a claim for the land against him."

Most of the cases cited and relied on by the defendant are not in point. Where the grantee wrongfully procures the holder of a deed as an escrow to deliver it to him, he acquires no title, or at least a voidable one; but this is a very different case from where a third person without notice, afterwards and while the grantee is in possession, deals with him in good faith as owner. Again, it may be conceded that the delivery of a deed by one who simply holds it as a depositary transfers no title; but, if he holds it as an escrow, with power to deliver it on certain conditions, a delivery, though wrongful, is not in excess of his authority, for, in such case, the act is within his authority, and binds the principal as against an innocent party. And so a deed held in escrow, delivered after the death of the principal, passes no title. It will readily appear, from reasons already given, that such cases are without application to the case under review. Here it will be conceded that, as between the grantor and the grantee, the latter took no title, because delivered by Howard contrary to his instructions. But the plaintiff relies on the fact that, as found, he had no knowledge that the deed had ever been held as an escrow, and in good faith loaned his money and took a mortgage on the land to secure it, and that the defendant is thereupon estopped from setting up his legal title as against him.

But it is claimed that, as the plaintiff relies on an estoppel, he should have pleaded it. This rule, however, only applies where the party has had an opportunity to do so. In this case he had none until the evidence had been introduced. The defendant, in his answer and cross-petition, set up that the deed from him had been placed in escrow, and wrongfully delivered to the grantee, and that the plaintiff had knowledge of the facts. The plaintiff then averred his want of any knowledge or belief as to the facts stated by the defendant, and denied them. The court, however, found that the deed had been delivered to Howard Colvin to be held as an escrow, and was by him wrongfully delivered to the grantee, but also found that the plaintiff was ignorant of the facts, and an innocent purchaser for value without notice. The object of pleading is to inform the opposite party of the facts on which the pleader relies as the ground of his claim or defense, and here, when the plaintiff denied knowledge of the facts as pleaded by the defendant, he fairly advised the defendant that he relied on an estoppel, on the ground of want of notice, should the facts as pleaded be made to appear in the evidence, except as to the matter of notice; for that he was a purchaser for value appeared from his petition, which was taken as true, as it was not controverted. Hence the claim of the plaintiff could in no way surprise the defendant unless he was ignorant of the law. The first opportunity the plaintiff had to plead an estoppel, as against James E. Colvin, was when the facts were fully made to appear in evidence; and he is not, therefore, precluded from doing so on the facts as found by the court.

Judgment reversed, and judgment on the facts for the plaintiff in error.¹²

MATHESON v. MATHESON.

(Supreme Court of Iowa, 1908. 139 Iowa, 511, 117 N. W. 755.)

Appeal from District Court, Buena Vista County, A. D. Bailie, Judge.

Action in equity to establish the plaintiff's rights in certain lands, and for partition. Decree as prayed, and defendants, except Buena Vista county, appeal. Affirmed.

WEAVER, J. The evidence shows with but little substantial dispute the following facts: On March 1, 1894, Samuel Matheson, be-

¹² There must be a delivery of a deed in the grantor's lifetime in order to make it effective. Consequently, a deed found among the grantor's papers after his death, with no evidence of its delivery, is of no effect, although it was fully executed and acknowledged. *Wiggins v. Lusk*, 12 Ill. 132 (1850). See, however, *Cummings v. Glass*, 162 Pa. 241, 29 Atl. 848 (1894), where, although a deed was found among the grantor's papers in his safe, yet there was evidence to show that it had been delivered in his lifetime.

ing then somewhat advanced in age, married the plaintiff herein. On June 25, 1905, the said Matheson died intestate, leaving the plaintiff, his widow, and several children by a former marriage his heirs at law. Prior to the date of his marriage, the deceased owned a quarter section of land in Buena Vista county, upon which there was a mortgage indebtedness of \$600 owing to the school fund of said county. Shortly before his marriage to plaintiff, Matheson visited the office of Hon. E. E. Mack, a practicing lawyer at Storm Lake, and executed a deed in due form to his intended wife, Elizabeth Harvey, for the west one-half of said tract of land. This instrument he left in the hands of Mr. Mack, with instructions to keep and give it to the grantee. Later, and after the marriage had taken place, Matheson called upon Mr. Mack and asked for the deed, but Mack declined to surrender it, and soon thereafter Matheson appeared again, accompanied by his wife, and the paper was thereupon delivered to her. The only evidence as to what became of it is the testimony of plaintiff, who says that, after reaching home on the day the deed was delivered to her, Matheson asked where it was, and she handed it to him, and that he then and there, without her consent and against her protest, put it in the stove, and destroyed it. She had never read the deed, and could not of her own knowledge state its contents. Mr. Mack swears that it was the ordinary form of warranty deed, and he is corroborated in part by another witness who claims to have read the paper while in Mack's possession, and recognized it as an ordinary deed of conveyance.

The only testimony in any way tending to discredit the claim that the conveyance was absolute is the testimony of several witnesses that at an interview with several members of her husband's family, in which there was some effort to compromise the matter without litigation, plaintiff said she understood the deed gave her a life estate in the property. Reliance is also placed on the fact that, after her husband's death, plaintiff listed the entire quarter section as part of his estate, but she explains that this was done because of her understanding that the destruction of the deed deprived her of any right thereunder. After the marriage and during the lifetime of Matheson, plaintiff united with him in making a new note and mortgage to Buena Vista county for the same indebtedness secured by the mortgage first above-mentioned. She says she signed the mortgage as surety only, and there is nothing tending to show that she received any consideration therefor other than the extension of time of payment of her husband's debt.

Upon this showing, the trial court found for plaintiff, quieting her title in the west half of the quarter section, giving her a widow's share in the remaining lands, and making the debt due the county primarily a charge on that portion of the lands received by the heirs at law.

1. Appellants argue that there is no sufficient showing of the de-

livery and acceptance of the deed. The point is not sustained by the record. The testimony of Mr. Mack, which is without substantial dispute by any person, shows a complete and perfect delivery. When the deed was placed in his hands for the benefit of the grantee, no other delivery was required to pass the title. *White v. Watts*, 118 Iowa, 549, 92 N. W. 660. It is an elementary proposition in the law of deeds that the delivery to a third person for the grantee without any reservation by the grantor of a right to recall it is sufficient in law, and effects a complete transfer of the title to the property which is the subject of the conveyance. *Taft v. Taft*, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291; *O'Neal v. Brown*, 67 Ga. 707. But counsel say there must be an acceptance in order to make perfect the delivery, and there is no proof here that plaintiff accepted the deed. Where a deed or instrument purporting to convey valuable property and creating no obligation or burden to be assumed by the grantee is delivered to the manual possession of the grantee himself or to some third person for such grantee's benefit, his acceptance is presumed until the contrary is shown. *White v. Watts*, supra; *Chapin v. Nott*, 203 Ill. 341, 67 N. E. 833; *Brown v. Westerfield*, 47 Neb. 399, 66 N. W. 439, 53 Am. St. Rep. 532. There is nothing in the record to overcome this presumption with respect to the deed now in controversy. On the contrary, such evidence as there is tends to strengthen and support that inference. The fact that the grantee had not read the paper, and had the impression that it was for a life estate, does not deprive her of the benefit of the rule if she did not consent to the destruction of the deed, and asserted her rights thereunder when she became informed of its true nature.

2. It is true that the destruction of an unrecorded deed by the parties thereto with the intention by both to abandon the conveyance and restore the title to the grantor creates such an equitable right or interest in the latter that the grantee will be considered as holding the title in trust only for the benefit of the grantor. *Blaney v. Hanks*, 14 Iowa, 400; *Happ v. Happ*, 156 Ill. 183, 41 N. E. 39. But the facts developed in this case do not bring it within the rule here referred to. There is no showing whatever that the deed was destroyed with the concurrence or consent of the plaintiff, and we see no way to avoid the conclusion that the title to the land therein described became and remained vested in her. The title being once vested, the destruction of the deed by the grantor after the delivery was no more than the destruction of the written evidence of the conveyance, and had no effect in law or in equity upon the title of the grantee to the property conveyed.

3. The appellants seek to defeat the plaintiff's claim of title by an application of the rule concerning the election of remedies. This contention is grounded upon the proposition that plaintiff having originally

listed the land as a part of her husband's estate, and having obtained her allowance for a year's support under the statute (Code, § 3314), and having in her original petition in this proceeding asked to have her dower established in this with other lands, she must be held to have elected to accept the rights of a widow in the land, instead of asserting title thereto under her deed. But we are of the opinion that the rule relied upon has no proper application here. In listing the property of the estate, the plaintiff was not instituting any action or proceeding for the determination of her rights in or to such property. The disputed question of title to land, as between the widow and heirs, could not under our practice be determined by probate proceedings for the settlement of the estate where the sale of such property is not required for the payment of debts or legacies. Generally speaking, that question may be settled only by some direct action at law or in equity in which the issue could be properly litigated. When, therefore, plaintiff as administratrix of her husband's estate, acting mistakenly or otherwise as to her rights in the premises, listed the land, she cannot be said to have elected to take or pursue a remedy for the determination of her own rights therein. It may be admitted that she might under some circumstances so conduct herself with reference to the matter of administration as to estop her from thereafter claiming some right or rights which might otherwise be successfully asserted, but in this instance there is no showing that the heirs or any of them have been misled to their prejudice by the act of plaintiff in listing the land, and no ground of estoppel appears. The mere fact that the widow through misapprehension of her legal rights permits exempt property to get into the hands of the administrator as assets of the deceased husband's estate has been held not to defeat her right to said property. *Estate of Ring*, 132 Iowa, 216, 109 N. W. 710.

Nor do we see how the mistaken listing of lands of the widow as belonging to the estate will estop her from asserting her right thereto when the mistake is discovered, in the absence of any showing or suggestion that the heirs have been led by her act to incur any expense or have been placed in any more unfavorable position than they would have occupied had she asserted her right at the outset. Neither can the fact that at the beginning of this proceeding plaintiff claimed but a distributive share in the land be held such an election as to estop her from amending her pleading and enlarging her claim to include the entire estate therein. She came into court asking to have her rights as widow established in all of the lands of which her husband died seised, and at first included this land with others in her petition. Later, when, as the evidence tends to show, she for the first time discovered that her rights under the deed were not lost by its destruction, she amended her petition by limiting her claim for distributive share to those lands not included in said deed, and asked that her title to this particular tract be quieted against the claims of the heirs.

It is very clear that these facts do not present a case where a plaintiff upon the same transaction or state of facts may pursue either one of two or more remedies. If, as she claims, the deed to plaintiff had been delivered, and she had not concurred in its destruction, she was not put to a choice between inconsistent remedies, and there can be no occasion for resorting to the rule respecting an election. While she had two rights of action—one for the establishment of her rights as grantee in the deed and another for the establishment of her rights as widow in lands of which her husband died seised—the two rights were based upon different states of fact, and pertained to different tracts of land. Her right of dower or distributive share could attach to no land other than that of which Matheson died seised, and, if after beginning her action she discovered and asserted her right to the entire fee in one tract, there is nothing to preclude her from pursuing such course in the absence of any sufficient plea and proof of matter amounting to an estoppel.

It is not seriously contended that the court erred in relieving the plaintiff from any personal liability save as surety for her husband's bond or debt to the school fund. The testimony clearly shows that the indebtedness originated long before the marriage with plaintiff, and that her husband was the principal debtor. This, of course, does not relieve her from liability to the county, but she is entitled to be protected against loss by reason of such liability in the distributive share of the proceeds arising from the partition sale of the land.

We are satisfied with the correctness of the decree as entered by the trial court; and it is affirmed.

CONDITIONS, COVENANTS, AND WARRANTIES IN DEEDS

I. Conditions in General ¹

See *Frank v. Stratford-Handcock*, reported herein, ante, p. 191, for distinction between conditions and covenants.

II. Building Restrictions ²

RIVERBANK IMPROVEMENT CO. v. BANCROFT.

(Supreme Judicial Court of Massachusetts, 1911. 209 MASS. 217, 95 N. E. 216,
34 L. R. A. (N. S.) 730, Ann. Cas. 1912B, 450.)

Bill by the Riverbank Improvement Company and others against Charles F. Bancroft and others to restrain a violation of a restriction contained in a deed. Decree for plaintiffs, forbidding the use of a building as a garage in violation of the restriction, and for its removal unless used for a purpose not inconsistent with the restriction.

HAMMOND, J. The physical facts as to the size, situation and construction of the building in question are not in dispute, and the defendants admit that the building is being used by them as a garage for their own automobiles and that unless restrained by legal process they intend to continue such use. The main question on the merits is whether in the building itself or in such a use of it there is anything inconsistent with any of the restrictions to which the land is subject.

Those restrictions were imposed in the deed of the Riverbank Improvement company, hereinafter called the company, to George Wheatland (under whom the defendants claim by mesne conveyances), dated August 11, 1899, and duly recorded; and so far as material to the question before us they are as follows:

"First. No buildings other than dwelling houses (which word shall include club houses), with the usual outbuildings appurtenant thereto, shall be erected, placed, or used upon the said land. Such outbuildings shall be erected only on the southerly side of said twenty-foot street or way, and no portion of said outbuildings shall be higher than eight feet above the grade of the street in front of the premises hereby

¹ For discussion of principles, see *Burdick*, Real Prop. § 290.

² For discussion of principles, see *Burdick*, Real Prop. § 292.

conveyed. No stable of any kind, private or otherwise, shall be erected or maintained on any portions of said land. * * *

"Second. No building erected on said land shall be used for any manufacturing * * * or mechanical purposes.

"Third. No building, except the customary outhouses to dwellings, shall be erected or placed upon the said land, the exterior walls of which shall be composed of any other material than brick, stone or iron. * * *

"Fifth. No buildings, other than the usual outbuildings appurtenant to dwelling houses, shall be erected or placed on said land northerly of a line parallel with and distant seventy feet north from the building line established in the [fourth] restriction."

The plaintiffs contend that the first restriction has been violated in two respects, namely, first, that the building is not of the kind described as the "usual outbuildings appurtenant" to a dwelling house, and, second, that it is a stable within the meaning of that word as used in the restriction.

It becomes necessary to look into the deed and the circumstances under which it was made. About 1890 the plaintiff company acquired title to a large parcel of land and laid it out in building lots. Block B, of which the land conveyed in the above mentioned deed to Wheatland was a part, contained 28 lots. Restrictions like those in this deed had been imposed by the company in the deeds of these lots except that in the deed of lot No. 1, which was the first lot conveyed, the clause prohibiting the erection or maintenance of a stable does not appear. The deeds were all in one standard form, and each contained a recital that the restrictions "are intended and shall be for the benefit of the grantor and of the owner or owners from time to time of all the land aforesaid constituting said Block B. shown on said plan, and none other." It is apparent from the form of the deeds and from the other facts shown, that the company intended that this territory, situated upon the south bank of the Charles river and at some distance from the business section of the city, should be a fine residential district, and that it took great pains to frame the deeds in a manner calculated to make this intent effectual not only for the present but also for the future. This was to be a place for dwelling houses and the "usual outbuildings appurtenant" thereto, and (with the exception of club houses) for them alone.

Under the law existing at the time those restrictions were imposed they were to have force only for 30 years. Rev. Laws, c. 134, § 20. We are dealing therefore not with restrictions unlimited as to use, but limited to 30 years, and the deed is to be construed as if the term of 30 years had been expressly inserted therein. The restrictions are to be interpreted in the light of the circumstances existing at the time they were imposed; and the words "usual outbuildings appurtenant" (to dwelling houses) as well as the word "stable" are to

be construed as including only such buildings as were fairly indicated by the respective words at that time.

Under this rule of interpretation is this building a stable? In Webster's Dictionary, edition of 1864, a stable is defined as "a house or building for horses or other beasts"; in Webster's edition of 1903, as "a house, shed or building for beasts to lodge and feed in, especially, a building or apartment with stalls for horses, as a horse stable or cow stable"; and in the edition of 1910 in practically the same language; in the Century Dictionary, as "a building or an inclosure in which horses, cattle, and other domestic animals are lodged, and which is furnished with stalls, troughs, racks, and bins to contain their food and necessary equipments; in a restricted sense, such a building for horses and cows only; on a still narrower and now the most usual sense, such a building for horses only"; in the Standard Dictionary, edition of 1895, as a "building or part of a building set apart for lodging and feeding horses or cattle, especially one fitted with stalls, fastenings, etc., also often for storing hay or putting up vehicles; sometimes specifically carriage-stable, cow-stable, etc." In 36 Cyc. 812, and in 26 Am. & Eng. Encyc. of Law, page 154, it is defined as "a house, shed or building for beasts to lodge and feed in." See also *Dugle v. State*, 100 Ind. 259.

While it is true, as stated by the plaintiffs, that in the Standard Dictionary, editions of 1895 and 1908, a stable is defined as a building often used for putting up vehicles, and that in the Standard and Century Dictionaries a garage is defined as "a stable for motor cars" and "a building, as a stable for the storing of automobiles or other horseless vehicles," we nevertheless think that the word "stable" as commonly used and understood at the time of the imposition of those restrictions, especially when contrasted with other buildings usually appurtenant to a dwelling house, carried the idea not only of a building but also the presence of domestic animals like horses or cattle as its occupants, and that such is the meaning of this word in the restriction. Accordingly it must be held that the building is not a stable within the meaning of the restriction. And this is so even if, as argued by the plaintiffs, a garage is as objectionable as a stable.

The next question is whether the building is of the kind which was usually appurtenant to dwelling houses at the time the restriction was imposed. If it is not, then its erection was in violation of the restriction. It is to be borne in mind that we are dealing with a proposed residential district of a high grade, and that this district is not in a country town, but in a city, a district to be divided into building lots and to be covered substantially with dwelling houses. Whatever buildings were usually needed and occupied as aids to the use of the dwelling houses might be erected and occupied as such aids. At the time these restrictions were put on, the garage was not the kind of building usually appurtenant to a dwelling house. Its erection was a violation of the restriction.

It is urged by the defendants that the restriction is against public policy, and that consequently a court of equity will not lend its aid in its enforcement; and they cite some cases where, because the restrictions have been against public policy or were whimsical and tended to place an unreasonable hindrance to the use of land, equity has refused to interfere. But this case is clearly distinguishable. The automobile is a large machine, and it is noisy, especially when starting. The odor of gasoline by which many of them are propelled is penetrating and disagreeable; and there can be no doubt that the noises and odors attendant upon the care and action of such machines, especially when stored so near to dwelling houses as in this case, may be annoying to a person desiring a quiet home. If, in these days of noise and bulging, intrusive activities, a man who has been in confusion all day desires to have a home where, awake or asleep, he can pass his hours in quiet and repose, there is no reason of public policy why, if he can get it, he should not have it. Nor is there any reason why provision should not be made for a collection of such homes in close proximity to each other. No citation of authorities is needed to show that in this commonwealth such a restriction is reasonable and not against public policy.

It is further urged that the plaintiffs have shown no right to prosecute this bill. But this position is untenable. Pillsbury, one of the plaintiffs, is an owner of land for the benefit of which the restrictions were imposed, and the company which imposed the restrictions may, even if no longer an owner, appear to aid in their enforcement for the benefit of their grantees.

The final question respects the relief to be granted. It is urged by the defendants that the building itself does not in any way conflict with the restrictions; that neither in size, location nor in the materials of which it is constructed does it violate the restrictions, and that the only violation consists in its use. And hence they say that the decree should not order the removal of the building, but only forbid its use as a garage. While it appeared that the building was erected principally for the automobile, yet it also appeared that it has been "used as a place to keep vegetables, double windows, blinds, and other minor household things, and was so intended to be used at the time of its erection"; that "it has also been used as a place [in which] to freeze ice cream and do other small household things"; and that "during the summer barrels and other things about the yard are locked up there." Whether or not, as claimed by the plaintiffs, these facts are contradictory of the pleadings, there can be no doubt that they may be properly taken into consideration on the question of the kind of relief. It further appears that the building is not a nuisance and does not obstruct the view from the windows of the houses in Block B.

Even if the defendants should be ordered to take this building down upon the ground that it was originally constructed for a use in-

consistent with the restriction, it is manifest that they might immediately erect one exactly its duplicate for the purposes for which, as above stated, it was intended to be used in part and has been so used. But it is to be noted that the restriction forbade the erection of the building for a garage as well as its use for that purpose.

Under these circumstances we think justice will be done by a decree which will simply compel the defendants to cease the illegal use, and further to remove the building unless it be used for a purpose not inconsistent with the restriction. There should be a decree for the plaintiffs forbidding the use of this building as a garage or a storehouse for an automobile, and for its removal unless it be used for a purpose not inconsistent with the restriction, and for costs. So ordered.

III. Covenants in General ^a

1. REAL AND PERSONAL COVENANTS

CONDUITT v. ROSS.

(Supreme Court of Indiana, 1885. 102 Ind. 166, 26 N. E. 198.)

Appeal from superior court, Marion county.

MITCHELL, J. On the 26th day of April, 1875, Julia A. Ross and John Hauck were the owners of adjoining lots in the city of Indianapolis. Pursuant to a written agreement entered into by Mrs. Ross and her husband on the one part, and Mr. Hauck on the other, she placed one-half the width of the south wall of a four-story brick and stone building which she erected on her lot on the north margin of the Hauck lot. After erecting the building she conveyed the lot, with the improvements thereon, to George P. Bissell, reserving, by a stipulation contained in her deed, the right to receive compensation from adjoining property owners for the building, or use of existing party-walls. Subsequently the appellant became the owner of the Hauck lot, and in 1882 commenced the erection of a building thereon, and attached the same to and used the wall erected by Mrs. Ross. Refusing to make payment, this suit was commenced to recover one-half the original cost of the wall. Upon issues made, a trial was had, which resulted in a finding and judgment for the plaintiff.

Counsel for appellant rest their argument for a reversal of this judgment mainly upon the proposition that the agreement between Hauck and Mrs. Ross was purely personal to them, and that Conduitt, by using the wall erected in pursuance thereof, came under no obligation whatever in consequence of such use. They insist further, that, if liable at all, the extent of his liability was the actual value

^a For discussion of principles, see Burdick, Real Prop. §§ 294-303.

of the wall when used, and not its original cost. The rights and obligations of the parties must be determined by a construction of the agreement already referred to, which is of the following tenor:

"This agreement between John Hauck of the first part, and Julia A. Ross, and Norman M. Ross, her husband, of the second part, witnesseth: That, in consideration that the parties of the second part shall erect a substantial brick wall, twelve inches in thickness, and four stories high, on the line dividing the property of John Hauck and Julia A. Ross, in square 87, in the city of Indianapolis, Marion county, Indiana, which line is twelve feet south of the south line of lot No. 4, in Morris Morris' subdivision of square 87, in the city of Indianapolis, and which wall is to stand six inches in width upon the ground of said Hauck, and six inches upon the ground of said Ross, and is to run back the depth of said Ross' present building, and may at any time be extended further back on the same line the full depth of said lots, by either party, the full consent of said Hauck to the erection of said walls being hereby granted:

"Now, therefore, said John Hauck hereby binds himself, his heirs, executors, administrators, and assigns, that whenever, after the erection of said wall or walls by the party of the second part, said Hauck, his heirs, executors, administrators, or assigns, shall, in any building he or they may erect on the present ground of said Hauck, use said wall, or any part thereof, or attach any part of his or their building thereto, then the said Julia A. Ross shall be paid, without relief from valuation or appraisal laws, the full value of one-half the original cost of said wall or walls. And it is further agreed that neither party shall have the right to so use any part of said wall or walls as to weaken or endanger the same; and that said Hauck, his heirs, executors, administrators, or assigns shall not, in any wise whatever, use or attach to said wall or walls so to be erected by said Ross, until the said value and costs of one-half thereof shall be ascertained, and paid or tendered to said Julia A. Ross.

"In witness whereof, we have hereunto set our hands and seals, this 26th day of April, 1875.

"[Signed] John Hauck. [Seal.]

"Julia A. Ross. [Seal.]

"N. M. Ross. [Seal.]"

This agreement was duly acknowledged, and recorded in the miscellaneous records of Marion county, and it is averred that the appellant had actual notice of it at the time he purchased.

The liability of the appellant depends upon whether the contract set out constituted a continuing covenant, which became annexed to, and ran with, the Hauck lot. If it did, he is liable according to its terms; if it did not, he is liable in this form of action for nothing.

In considering whether a covenant is one which does, or does not, run with land, there are always embraced the following inquiries:

(1) Is the covenant one which, under any circumstances, may run with land? (2) Was it the intention of the parties, as expressed in the agreement, that it should so run?

Doubtless, a covenant which, from its character, might run with the land, may be so restricted in terms as to make it purely personal, and available to the parties to it, and no other. So, too, a covenant may contain apt words to make it a continuing covenant, yet if its nature or the subject-matter of it is such that it does not concern some interest or estate in land, either existing or created by it, it cannot run with land. When an instrument conveys or grants an interest or right in land, and at the same time contains a covenant in which a right attached to the estate or interest granted is reserved, or when the grantee covenants that he will do some act on the estate or interest granted which will be beneficial to the grantor, either as respects his remaining interest in the lands out of which an interest is granted, or lands adjacent thereto, such covenant is one which may become annexed to, and run with, the land, and bind its owners successively. When such grant is made, and contains a covenant so expressed as to show that it was reasonably the intent that it should be continuing, it will be construed as a covenant running with the land. A covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed. In *Bally v. Wells*, 3 Wils. 25, it was said: "When the thing to be done, or omitted to be done, concerns the lands or estate, that is the medium which creates the privity between the plaintiff and defendant."

By the contract under consideration, Mrs. Ross acquired the right to enter upon the Hauck lot and erect, and permanently maintain thereon, a party-wall. This was a grant to her of an interest in land, and was of such a character that a perpetual covenant might be annexed to it. *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; 1 Smith Lead. Cas. (8th Ed.) 161, 162. In consideration of this grant to her, she covenanted to do an act beneficial to the remaining interest of Hauck. That act was the erection of a wall so situated as that one-half of it should rest on the margin of his lot and the other half on hers, thus devoting each estate to the mutual support of the party-wall. She, at the same time, covenanted that when she should be reimbursed one-half of the cost of the wall, he or his grantees should acquire a reciprocal interest in her lot, and, in legal effect, become owner of one-half the party-wall. This agreement created what has been aptly termed mutual, or cross, easements in favor of each in the lot of the other, and was an arrangement mutually beneficial to both properties. *Fitch v. Johnson*, 104 Ill. 111; *Roche v. Ullman*, Id. 11; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Thomson v. Curtis*, 28 Iowa, 229. It contained, therefore, all the elements neces-

sary to a covenant capable of running with the land. *Hazlett v. Sinclair*, supra; *Richardson v. Tobey*, 121 Mass. 457, 23 Am. Rep. 283; *Standish v. Lawrence*, 111 Mass. 111; *Maine v. Cumston*, 98 Mass. 317; *Savage v. Mason*, 3 Cush. (Mass.) 500; *Brown v. McKee*, 57 N. Y. 684; *Keteltas v. Penfold*, 4 E. D. Smith (N. Y.) 122; *Platt v. Eggleston*, 20 Ohio St. 414; *Masury v. Southworth*, 9 Ohio St. 340; *Bertram v. Curtis*, 31 Iowa, 46; *Norfleet v. Cromwell*, 70 N. C. 634, 641, 16 Am. Rep. 787.

It is apparent, too, that it was the intention of the parties that the covenant to pay should run with the land. The words used in that connection are those usually and aptly employed for the purpose: "John Hauck hereby binds himself, his heirs, executors, administrators, and assigns, that whenever, after the erection of said wall or walls by the party of the second part, said Hauck, his heirs, executors, administrators, or assigns, shall, in any building he or they may erect," etc., "they will pay," etc. A continuing covenant may exist without the word "assigns," or "grantees," but when these or equivalent words are used, they become persuasive of the intent of the parties. *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278. It was the manifest purpose of the parties that the right to receive payment for the wall should be personal to Mrs. Ross. It was stipulated that payment should be made to Julia A. Ross. It results that the complaint was sufficient, and that the second paragraph of answer, in which it was alleged that the wall, by reason of injuries sustained from fire, was worth much less than the original cost, was insufficient, and the respective rulings of the court were not erroneous. The covenant being one which ran with the land, when the appellant availed himself of its benefits he became related to it as the original covenantor, and it became the measure of his obligation.

We think it is fairly deducible from the complaint that the appellant derived his title through Hauck. Judgment affirmed, with costs.

On Rehearing.

(June 13, 1885.)

MITCHELL, C. J. The learned counsel for appellant, in support of their petition for a rehearing, suggest that it was decided in *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287; *Taylor v. Owen*, 2 Blackf. 301, 20 Am. Dec. 115, and *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254, that an instrument of the character in question here does not convey or grant an interest in land. We entertain a different view of the cases mentioned. *Bloch v. Isham*, supra, was a suit by the grantee of the first builder to recover from the second builder one-half the cost of a party-wall, and it was held there, as we hold here, that the right to receive payment for the wall was personal to the first builder. It is true it was said in that case that it turned "upon the solution of the question as to whether Isham's agreement to pay for

one-half of the party-wall is a covenant running with the land." Under the Iowa statute it was held, in the cases cited in the principal opinion, that an easement is created, and that both the obligation to pay and the right to receive payment run with the land. We think the covenant to pay might well run with the land, while the right to receive payment might, as it was held in *Bloch v. Isham*, supra, be personal to the first builder. This must depend upon the contract, in the absence of statutory regulation. It was said in that case that the agreement there under consideration embraced, substantially, the provisions of the Pennsylvania statute. Under the statute of that state, the second builder is always held liable to pay the first builder which, we think, is the result of the agreement in this case.

So far as *Bloch v. Isham*, supra, holds that the agreement was personal to the first builder, and did not inure to the benefit of his grantee, which was the only question before the court, we are strictly in accord with it. What was said beyond that must be regarded as having resulted from the distinction which is to be made between the agreement there under review, and that which we are considering. The covenant, as it is there recited by the court, is: "Schenck and Isham * * * entered into a written agreement, whereby Schenck acquired the right to build one of the walls of a brick store, then in process of erection on his own lot, with one-half of its thickness resting on the lot of Isham; and Isham acquired for himself, his heirs or assigns, the right to use said wall by joining a building thereon, and agreed for himself and them to pay one-half of the original cost of said wall, when he or they should use the same." In effect, Isham personally agreed for himself and his grantees to pay when he or they should use the wall. In the case before us Hauck made no such agreement.

It may be said, moreover, that the case of *Weld v. Nichols*, 17 Pick. (Mass.) 538, which is regarded as conclusive of the question there involved, will be found to have a very remote, if any, bearing on the question we are considering under this agreement. We have said this much to indicate that, so far as the point involved in *Bloch v. Isham*, supra, was concerned, we are in accord with it, and beyond that it must be considered as distinguished by the character of the agreement. As to *Taylor v. Owen*, supra, the principles involved are essentially different, and for support of the proposition that a continuing covenant may be annexed to an easement in land, and that there is in consequence such privity of estate as makes the appellant liable on the covenant, we need go no further than *Hazlett v. Sinclair*, supra.

The petition for a rehearing is overruled.

IV. Covenant against Incumbrances ⁴

GEORGE A. LOWE CO. v. SIMMONS WAREHOUSE CO.

(Supreme Court of Utah, 1911. 39 Utah, 395, 117 Pac. 874,
Ann. Cas. 1913E, 246.)

Appeal from district court, Second district; J. A. Howell, Judge.
Action by the George A. Lowe Company against the Simmons Warehouse Company. From a judgment for plaintiff, defendant appeals. Modified, and remanded for judgment for plaintiff, as stated.

STRAUP, J. The plaintiff on the 26th day of January, 1909, purchased from the defendant a parcel of land 69 by 228 feet in Ogden City. The deed was made and delivered on the 11th day of February of the same year. It was a statutory short-form warranty deed. Such a deed has the effect of warranting the premises conveyed free from all incumbrances. The controversy is over the taxes for the year 1909. The defendant claimed that they were no lien on the property at the time of the purchase and conveyance, and refused to pay them. The plaintiff paid them, and then brought this action on breach of warranty to recover from the defendant the amount paid by plaintiff, with interest and an attorney's fee. The plaintiff was given a judgment for the full demand, from which the defendant has prosecuted this appeal.

Three questions are presented: (1) Were the taxes an incumbrance when the land was purchased? (2) If so, was there a breach before the taxes became delinquent and the property sold for nonpayment of them? (3) Was the plaintiff entitled to an attorney's fee as part damages?

Under our tax laws the assessor is required "before the first Monday of May in each year" to ascertain the names of all taxable inhabitants and all property in the county subject to taxation, and to "assess such property to the person by whom it was owned or claimed or in whose possession or control it was at twelve o'clock m. of the second Monday in January next preceding and its value on that date." Before the first Monday in May the assessor is required to list in the assessment book all taxable property in the county, the name of the person to whom it is assessed, a description of the property, and its cash value. Before the first Monday in May the assessor must deliver the assessment book to the treasurer, who is required to furnish a notice to each taxpayer. Between the first and the fourth Monday in June, the board of county commissioners is required to examine the assessment books and equalize the assessment of property in the county, and is given power to increase or lower any assessment con-

⁴ For discussion of principles, see *Burdick*, Real Prop. § 299.

tained in the assessment book and to make and enter new assessments, and between the first Monday in July and the second Monday in August to fix the rate of county taxes. Before the first Monday in August the State Board of Equalization is required to determine the rate of state taxes. In the month of July city councils and boards of trustees are required to determine the rate of the general city or town tax, levy the same, and certify the rate and levy to the county auditors. Taxes are due on the first Monday in September, and become delinquent on the 15th of November. On the 15th day of December the treasurer is required to expose for sale sufficient of the delinquent real estate to pay the taxes and costs. It is further provided that "every tax upon real property is a lien against the property assessed; and every tax due upon improvements upon real estate assessed to others than the owner of the real estate is a lien upon the land and improvements; which several liens attach as of the second Monday in January in each year."

The property purchased by the plaintiff from the defendant was a part of a larger tract owned by the defendant. The whole of the tract, including the portion sold to the plaintiff, was assessed for the year 1909 in the name of the defendant. The defendant, claiming that it was not liable for the taxes on the portion sold to the plaintiff, requested the assessor to segregate such portion from the portion still owned by it. The assessor so segregated the property in the latter part of October, determined the tax due on the portion sold to the plaintiff, and sent it a notice, who on the 2d day of November paid the tax, after a demand on the defendant to pay it, and its refusal to do so. The defendant now contends that the assessor had no authority to make such segregation at the time when it was made. It cannot be heard to complain of that, for the assessor's action in that regard was induced by and was taken on the defendant's request.

Its chief contention, however, is that the tax, not assessed and levied, the rate not determined, and the tax not due until after the purchase by plaintiff, was not a lien on the property when the purchase was made, and that a tax or an assessment cannot become a lien or incumbrance upon real estate within the covenant of warranty until the tax is assessed and levied, and the amount thereof ascertained. The case of *Dowdney v. Mayor, etc.*, 54 N. Y. 186, supports such a view. We think that would be true here were it not for the statute providing that the lien attaches "as of the second Monday in January of each year." Plaintiff's purchase was after that. Because of the statute we think the taxes for the year 1909 were a lien on the property conveyed, and constituted an incumbrance within the covenants of warranty. *Blossom v. Van Court*, 34 Mo. 390, 86 Am. Dec. 114; *McLaren v. Sheble*, 45 Mo. 130; *Martin County v. Drake*, 40 Minn. 137, 41 N. W. 942; *State v. Northwestern Tel. Exch. Co.*, 80 Minn. 17, 82 N. W. 1090.

The further contention that no breach arose until after the tax became delinquent and the property exposed to sale, or until the plaintiff was evicted, is, under the circumstances, untenable. The plaintiff paid the tax a month after it was due, and after the defendant itself had refused to pay it, and had disclaimed all liability in respect of it. The plaintiff, to protect the title which the defendant had warranted to it, was not required, under the circumstances, to sit by and wait until the tax became delinquent and the property sold, but was entitled to pay it after it became due and after the defendant had refused to pay it, and to protect the title with as little expense as possible. *MacFarland & Dupre v. Lehman et al.*, 38 La. Ann. 351, *Maloy v. Holl et al.*, 190 Mass. 277, 76 N. E. 452; *Witte v. Pigott* (Tex. Civ. App.) 55 S. W. 753. That the plaintiff did, and that was its duty. Neither the case of *Bruington v. Barber*, 63 Kan. 28, 64 Pac. 963, nor *Leddy v. Enos*, 6 Wash. 247, 33 Pac. 508, 34 Pac. 665, make against such a view. In the first the tax title which the vendee purchased was itself invalid, and therefore furnished no basis for a successful attack on the vendee's ownership or possession. In the second, the covenantee did not rely on the implied warranties of the statute, but on the warranties stated and expressed in the deed of conveyance. The failure to pay the taxes complained of was held not to be a breach of the expressed warranties.

The court, in addition to allowing the plaintiff a judgment for the amount of taxes paid by it and interest, also allowed \$75 attorney's fee. We do not see any authority to allow an attorney's fee. In some jurisdictions attorney's fees incurred by the covenantee in an action defending or asserting his title in good faith are recoverable by him from the covenantor in a subsequent action on the covenant. 8 A. & E. Ency. L. (2d Ed.) 190; 11 Cyc. 1178. But counsel fees in the action against the covenantor are not. 11 Cyc. 1178.

As a general rule, in an action for breach of the covenant against incumbrances, where the plaintiff purchased or extinguished the outstanding incumbrance, he is entitled to recover with interest the reasonable price which he fairly and necessarily paid for it, provided it does not exceed the amount paid by him to the covenantor or the value of the estate. 11 Cyc. 1165; 14 Cent. Dig. § 240; 6 Dec. Dig. § 132. We think he is not entitled also to attorney's fee in the action against the covenantor for breach of the covenant.

The judgment of the court below is therefore modified in that particular, and the case remanded, with directions to enter a judgment in favor of the plaintiff for the amount paid by it, with interest, and costs. Neither party is given costs on the appeal.

FRICK, C. J., and McCARTY, J., concur.

GEISZLER v. DE GRAAF.

(Court of Appeals of New York, 1901. 186 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659.)

Appeal from Supreme Court, Appellate Division, First Department.

Action by Mary Geiszler against Amanda M. De Graaf and others. Judgment for plaintiff. From an order of the appellate division (60 N. Y. Supp. 651) reversing the judgment and granting a new trial, plaintiff appeals. Affirmed.

O'BRIEN, J. The plaintiff is the remote grantee of lands which the defendants' testator owned on the 29th day of January, 1892, and on that day conveyed to one Knabe by deed with full covenants. At the time of this conveyance the lands were incumbered by a local assessment amounting to \$224.41, with interest. On the 12th day of March, 1892, Knabe conveyed the lands to one Breirly, expressly subject to the assessment, and on the 2d day of October, 1893, the latter conveyed to the plaintiff, with a covenant against incumbrances. On the 23d day of October, 1896, the plaintiff was obliged to and did pay the assessment, amounting at that date to \$341.31, in order to discharge the lien upon the land; and he now seeks to recover that sum, with interest, from the personal representatives of the original grantor from whom the title was derived.

The plaintiff cannot recover without establishing two propositions of law: (1) That the benefit of the covenant against incumbrances contained in the deed of the defendants' intestate to Knabe passed to the plaintiff through the intermediate conveyances; in other words, that it ran with the land. (2) That the continuity of the covenant was not interrupted or its benefits extinguished as to the plaintiff by the fact that his immediate grantor took the title expressly subject to the assessment or incumbrance which is the basis of the action. The right of a remote grantee of real estate to recover damages for breach of the covenants in the deed has been exhaustively discussed in a recent case in this court, and the point in that case was settled only after four appeals, and then by a bare majority of this court. But in that case the question that we are now concerned with was not involved, since the action was upon the covenant for quiet enjoyment and warranty made by a stranger to the title, and it was held that under the circumstances of the case the covenant of the stranger was personal, and did not run with the land. The case turned upon the point that there was no such privity of estate or contract between the husband who had joined with the wife in the covenant and the plaintiff as would attach the covenant to the land, and carry liability through the chain of title to a remote grantee. *Mygatt v. Coe*, 152 N. Y. 457, 46 N. E. 949, 57 Am. St. Rep. 521; *Id.*, 147 N. Y. 456, 42 N. E. 17; *Id.*, 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850; *Id.*, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646. That was a very

different question from the one now before us, which is simply whether the covenant against incumbrances runs with the land, so as to enable a remote grantee to recover upon it.

We can decide the case upon another question, comparatively insignificant, and leave the principal controversy open for litigants to grope their way through conflicting decisions to some conclusion as to what the law is on the subject. But the right of a remote grantee to recover for breach of the covenant against incumbrances is a question arising almost every day, and a court of last resort should meet it when presented, and settle the law one way or the other.

It was the general rule of the common law that all covenants for title ran with the land until breach. In this state it has been held that a breach of the covenants of seisin, of right to convey, and against incumbrances occurred, if at all, upon delivery of the deed, while those for quiet enjoyment, warranty, and for further assurance were not broken until an eviction, actual or constructive. Rawle, *Cov.* (5th Ed.) § 202, and note. And it has been generally held that those of the former class do not run with the land, while the latter do. The foundation of this distinction is not clearly traceable among the early English decisions. The principal reason for it, however, seems to have been that at common law no privity of estate or tenure existed between a covenantor and a remote covenantee, and, therefore, when a breach of a covenant of title occurred, if it was not such a covenant as was affixed to the land and ran with it, it could not be taken advantage of by a remote covenantee or a stranger to the original covenant, since it was, as to him, a mere chose in action, and at common law choses in action were not assignable. But now choses in action are assignable, and the question is whether the ancient law concerning the covenant against incumbrances has survived the reasons upon which it was founded.

The operation of the common-law rule upon the grantee seeking to enforce the covenant against incumbrances was always inconvenient, and the rule itself exceedingly illogical. While it was held that the breach occurred upon delivery of the deed, it was also held that the covenantee could not recover more than nominal damages until he had paid off the incumbrance, or had been actually or constructively evicted. *Delavergne v. Norris*, 7 Johns. 358, 5 Am. Dec. 281; *Hall v. Dean*, 13 Johns. 105; *Stanard v. Eldridge*, 16 Johns. 254; *Grant v. Tallman*, 20 N. Y. 191, 75 Am. Dec. 384; *McGuckin v. Milbank*, 152 N. Y. 297, 46 N. E. 490. It was virtually held that, when the incumbrance was a money charge which the grantee could remove, there were two breaches of the covenant,—one nominal, entitling the party to but nominal damages, and the other substantial, to be made good by the actual damages sustained,—and an action and recovery for the first breach was no bar to an action and recovery for the sec-

ond. *Eaton v. Lyman*, 30 Wis. 41; *Id.*, 33 Wis. 34. This rule did not apply to permanent incumbrances which the covenantee could not remove, such as easements and the like, since he had the right in those cases to bring his action immediately on the breach, and recover just compensation for the real injury.

A learned writer, commenting on the condition of the law of covenants as it formerly existed, stated the situation quite accurately in the following language: "It is evident from these cases that the current of American authority tends, with but little exception, towards the position that on total breach a covenant, though annexed to the realty, becomes a merely personal right, which remains with the covenantee or his executors, and does not descend with the land to heirs, nor run with it on any future assignment to third parties. The result of this doctrine, as generally applied in this country, is to deprive covenants which, like those for seisin or against incumbrances, if not good, are broken instantaneously, of all efficacy for the protection of the title, in the hands of an assignee, even when the loss resulting from the breach has fallen solely upon him. Thus the right of action on covenants, originally intended for the benefit of the inheritance in all subsequent hands, is denied, under this course of decision, to the purchaser of the land, although the party really injured." 1 *Smith*, *Lead. Cas.* p. 192, note by *Hare & Wallace*.

In England the law became so uncertain in this respect, as the result of conflicting decisions (*Kingdon v. Nottle*, 1 *Maule & S.* 355; *Id.*, 4 *Maule & S.* 53; *Spoor v. Green*, L. R. 9 *Exch.* 99), that the controversy was set at rest by the enactment of a statute which provided that the covenants should run with the land unless otherwise restricted in the conveyance. 44 & 45 *Vict. c.* 41, § 7. The same result has been accomplished in most of our sister states, either by judicial decision or by statute, where the covenant against incumbrances runs with the land. In this state, since the enactment of the Code making choses in action assignable, it has been held that the covenant against incumbrances passes with the land through conveyances to a remote grantee. *Coleman v. Bresnaham*, 54 *Hun*, 619, 8 *N. Y. Supp.* 158; *Clarke v. Priest*, 21 *App. Div.* 174, 47 *N. Y. Supp.* 489. But it has been held in the case at bar that it does not, and that proposition is based upon the common-law rule and upon a former decision of the same court. *Building Co. v. Jencks*, 19 *App. Div.* 314, 46 *N. Y. Supp.* 2.

With this conflict of views concerning the nature and effect of the covenant against incumbrances, and the remedy for a breach of it, this court should adopt the rule best adapted to present conditions, and which seems most likely to conform to the intention of the parties, and to accomplish the purpose for which the covenant itself is made. The covenant is for the protection of the title, and there is no good reason why it should not be held to run with the land, like the cove-

nant of warranty or quiet enjoyment. The principle which was at the foundation of the common-law rule that choses in action were not assignable having become obsolete, there is no reason that I can perceive why the rule should survive the reason upon which it was founded. We hold, therefore, that the covenant against incumbrances attaches to and runs with the land, and passes to a remote grantee through the line of conveyances, whether there is a nominal breach or not when the deed is delivered.

But in this particular case there is a fatal obstacle to the plaintiff's right to recover upon the covenant. The plaintiff's immediate grantor, as we have seen, purchased expressly subject to the incumbrance; and, while he owned the land, he could not take advantage of the original covenant made by the defendants' testator. The effect of his purchase, subject to the assessment, was to relieve the prior grantors from any liability to him on the covenant. Presumptively, he was allowed in the purchase to deduct the amount of the assessment from the purchase price, and he was therefore furnished by his grantor with the money to pay the assessment; and when he took the land, and was furnished with the money to pay the incumbrance, the obligation of the covenant was discharged and extinguished. He could not call upon any prior covenantor to pay the assessment, when they had furnished him with the funds to pay it himself. *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195. It is true that he did not pay, but conveyed to the plaintiff with a covenant against incumbrances. But the plaintiff acquired only such rights as his immediate grantor could assert against prior grantors. The plaintiff's grantor did not transmit to him any cause of action against the defendants. The covenant in the plaintiff's deed is a new covenant, and not the assignment of an old one. On the new covenant the plaintiff's grantor is liable, but the liability extends only to him, and cannot, through him, extend to prior parties. The plaintiff is under the same disability as his grantor, since he is in privity with him. For these reasons, the order should be affirmed, and judgment absolute ordered for defendants on the stipulation, with costs.

PARKER, C. J., and HAIGHT, LANDON, CULLEN, and WERNER, JJ., concur. GRAY, J., concurs in result.

Ordered accordingly.⁵

⁵ Generally in this country, the covenant against incumbrances stands alone—that is, as a separate and distinct covenant—and is not, as in England, regularly made a part of the covenant for quiet enjoyment. It may, of course, be incorporated in such a covenant, in which case it would run with the land, and would accrue to the benefit of even a remote grantee. See *Post v. Campau*, 42 Mich. 90, 3 N. W. 272 (1879). When the covenant stands alone, however, it is regarded as a covenant in present, broken, if at all, when made, and not running with the land. *McPike v. Heaton*, 131 Cal. 109, 63 Pac. 179, 82 Am. St. Rep. 335 (1900); *Smith v. Richards*, 155 Mass. 79, 28 N. E. 1132 (1891).

ABSTRACTS OF TITLE

I. Duties and Liabilities of Abstracters ¹

WALKER v. BOWMAN.

(Supreme Court of Oklahoma, 1910. 27 Okl. 172, 111 Pac. 319, 30 L. R. A. [N. S.] 642, Ann. Cas. 1912B, 839.)

On rehearing. Reversed.

For former opinion, see 105 Pac. 649.

DUNN, C. J. This case presents error from the district court of Oklahoma county, and is an action brought by plaintiff in error as plaintiff against C. J. Bowman and G. W. Stephenson, doing business under the firm name of Bowman & Stephenson, and certain sureties on their bond as abstracters. To the petition a demurrer was filed on the ground that the same did not state facts sufficient to constitute a cause of action, which the court sustained, from which action the appeal is prosecuted. From the petition it appears that the plaintiff employed and paid the principal defendants herein to prepare for her an abstract to a certain tract of land which she desired to purchase. She procured the abstract for the purpose of ascertaining the condition of the title. Prior to that date an attachment had been run against the land, and was an existing lien at the time the abstract was prepared and delivered, but was not shown on the abstract. Thereafter plaintiff, relying on the correctness of the abstract, purchased the land and subsequently sold it, giving a warranty deed thereto. Her grantee was compelled, in order to retain and protect his title, to pay off the attachment lien above mentioned, whereupon plaintiff became liable on her deed to her grantee for the amount of his damages. The petition fails to disclose that plaintiff has paid the damages incurred by her grantee, and it is the contention of counsel for defendants herein that, until plaintiff has made that payment, no cause of action accrues, contending that she had not been damaged within the meaning of the statute. Counsel for plaintiff contends that the damage accrued at the time the abstract was delivered, and the issue thus made is the one presented to us for our determination.

Section 1, c. 1, Comp. Laws Okl. 1909, provides for a bond to be given by persons who engage in the making of abstracts to contain the following provision that they (the abstracter and his bondsmen)

¹ For discussion of principles, see Burdick, Real Prop. § 304.

"will pay all damages that may accrue to any person by reason of any incompleteness, imperfections or error in any abstract furnished by him." The word "accrue," as used in that sentence, means to become a present and enforceable demand. *McGuigan v. Rolfe*, 80 Ill. App. 256, 259. "A cause of action accrues from the time the right to sue for the breach attaches." *Amy v. Dubuque*, 98 U. S. 470, 476, 25 L. Ed. 228; 1 Words and Phrases, p. 101. And the rule on the question presented as adduced from the authorities is stated by 1 Cyc. p. 217, as follows: "The right of action against an abstracter for damages resulting from an incorrect abstract accrues at the time the examination is made and reported, and not when the error is discovered or damages result therefrom." See, also, cases cited under note 39. The following cases cited to sustain the text and others are noted as follows: *Provident Loan Trust Co. v. Wolcott et al.*, 5 Kan. App. 473, 47 Pac. 8; *Schade v. Gehner*, 133 Mo. 252, 34 S. W. 576; *Rankin v. Schaeffer, Adm'r, et al.*, 4 Mo. App. 108; *Security Abstract of Title Co. et al. v. Longacre, Adm'r*, 56 Neb. 469, 76 N. W. 1073; *Brown v. Sims*, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. Rep. 308; *Russell v. Polk County Abstract Co.*, 87 Iowa, 233, 54 N. W. 212, 43 Am. St. Rep. 381; *Lattin v. Gillette et al.*, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115.

In the case of *Rankin v. Schaeffer, Adm'r, et al.*, *supra*, it is said: "The examiner of titles does not warrant. He is not liable, except for negligence or want of necessary skill and knowledge. The contract made by him when he receives a fee and examines a title is not one of indemnity, but a contract that he will faithfully and skillfully do his work; and this contract is broken, and an action lies for the breach of it, so soon as he, through negligence or ignorance of his business, delivers a false certificate of title. Where indemnity alone is expressed, it has always been held that damage must be sustained before a recovery can be had; but, where there is a positive agreement to do the act which is to prevent damage to plaintiff, there the action lies if defendant neglects or refuses to do the act. In *re Negus*, 7 Wend. [N. Y.] 499; *Ham v. Hill*, 29 Mo. 276; *Rowsey v. Lynch*, 61 Mo. 560." Also, in such a case where the petition alleges the breach of duty and also special and consequential damages, the breach of the duty, and not the consequential damage, is the cause of action. *Moore v. Juvenal*, 92 Pa. 484.

The petition alleges the insolvency of plaintiff's grantor, and also with some detail sets up her liability on a warranty deed which she had made to the property, and under the authorities above noted we think there can be no doubt about the liability of the defendants to her for the damage which she suffered by reason of any negligence on their part in making for her a faulty and erroneous abstract. If an abstracter could not be held liable under conditions presented and insisted on in this case, there would be practically no protection in

an abstract to those who secure and pay for the same for the purpose of relying thereon in the purchase of real estate.

The former opinion of this court in this case, reported in 105 Pac. 649, is reversed. The cause is accordingly remanded to the district court of Oklahoma county, with instructions to set aside the judgment heretofore rendered and proceed in accordance herewith.

TURNER, KANE, HAYES, and WILLIAMS, JJ., concur.

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REFERENCES FROM

Burdick's Cases on Real Property

(1914)

TO

THE CORPUS JURIS-CYC SYSTEM

For Collateral Reading and Review

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